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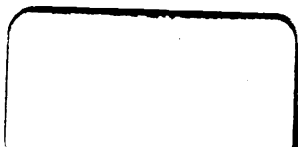
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REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED IN THE

SUPREME COURT



OF

THE STATE OF IOWA.

BY W. PENN. CLARKE,

REPORTER.

VOL. IV.

NEW YORK:

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1858.

Entered according to Act of Congress, in the year one thousand eight hundred and fifty-eight, by

W. PENN. CLARKE,

in the Clerk's Office of the District Court of the United States, in and for the District of Iowa.

Rec Nov 30. 1858

P R E F A C E .

THE profession is herewith presented with the **FOURTH VOLUME OF IOWA REPORTS**. Its publication has been delayed longer than was anticipated, by circumstances beyond the control of the Reporter. He has nearly sufficient matter for the **FIFTH** Volume, already prepared, and it will be published as speedily as possible. Under a rule of the Supreme Court, adopted at the December Term, A. D. 1857, the cases hereafter will be published in the order in which the opinions are filed, and each case will show the date at which the opinion was filed. Such other improvements will be made in the subsequent volumes, as will render them equal in appearance and style to the Reports of the older States.

The Reporter, thanking the members of the Bar, for the encouragement he has already received at their hands, and acknowledging his indebtedness to the judges and other officers of the court, for kindnesses rendered, trusts that his labors on the present volume, will prove useful to, and meet the approbation of, his brethren of the profession.

IOWA CITY, SEPTEMBER, 1858.



OFFICERS OF THE SUPREME COURT.

JUDGES.

Hon. GEORGE G. WRIGHT, Keosauqua, Chief Justice.
" WM. G. WOODWARD, Muscatine, } Judges.
" L. D. STOCKTON, Burlington. }

CLERK.

LEWIS KINSEY, Des Moines.

ATTORNEY-GENERAL.

SAMUEL A. RICE, Oskaloosa.

REPORTER.

W. PENN. CLARKE, Iowa City.



RULES OF THE SUPREME COURT.

At the December Term, A. D. 1857, the following additional rules were adopted :

RULE 24. Attorneys of the District Court, of any county of the State, admitted to practice in this court, may submit their causes on written or printed brief, filed with the clerk of this court, by complying with rule number 26.

RULE 25. The party holding the affirmative in this court shall furnish to the opposite party, ten days before the sitting of the court, or before the cause is set for trial, a memorandum of the points made and authorities cited, with an abstract of the argument. After receiving which, a like memorandum of points and authorities, with an abstract of the argument in reply, shall be furnished to the party holding the affirmative.

RULE 26. In case the appellant, or party holding the affirmative, fail to prepare and file for the use of the court in the argument and decision, a concise statement of the points in issue, and of the testimony, (as required by rule 18,) or in case of failure to furnish the opposite party a note of the points and authorities, and of the argument, (as required by rule 25,) such opposite party may, at the term at which the cause is entitled to be heard, file his statement and brief, and have the cause heard *ex parte*.

RULE 27. In publishing the opinions of the court, it is enjoined on the reporter to print them in the order in which the causes are decided. A memorandum of the date of the

decision of each cause should be appended in the margin. No opinion in any cause in which a petition for rehearing is filed, will be published until the question of rehearing is finally determined.

RULE 28. Appeals to this court are only perfected, as required by the Code, section 1974, by notice to the clerk of the District Court, and to the opposite party. Where a bond, however, to stay execution, has been filed, and a notice of appeal served upon either the clerk or the adverse party, the appellee may file the transcript of the record in this court, and have the judgment affirmed for want of prosecution, as under rule 5.

RULE 29. No person shall remove from the court room, or the office of the clerk, any record of this court, except upon special leave granted for that purpose. No record shall be taken from the files of the court, except on application to the court or clerk, and a receipt executed therefor. All records removed or taken from the files, shall be returned in such reasonable time as the court or clerk may direct, not exceeding five days. The clerk will report promptly to the court every violation of this rule. In no case will it be permitted to any person to remove any papers or records from the place in which the court holds its sessions.

RULE 30. Where appeals are taken less than fifteen days before the term, if the appellee designs insisting upon a hearing, or moving an affirmance of the judgment, at such term, he must give to the appellant notice in writing of such intention; and when the case is called, it will be heard or continued as the circumstances of each case may seem to render proper and necessary.

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ERRATA.

On page 157, at the end of line 17 from the bottom, for "*Sinamore*," read *Sinnamon*.

On page 212, in the 11th line from the bottom, for "has," read *had*.

On page 504, in line eight from the top, and in line seven from the bottom, for "trust," read *take*.

In *Miller v. Chittenden et al*, 252, the petition for a rehearing was filed by J. C. HALL, Esq.

On page 538, in line nine from the top, for "five," read *ten*.



CASES
 IN
Law and Equity,
 DETERMINED IN THE
S U P R E M E C O U R T
 OF
THE STATE OF IOWA;

IOWA CITY, DECEMBER TERM, A. D. 1856.

In the eleventh year of the State.

PRESENT:

HON. GEORGE G. WRIGHT, CHIEF JUSTICE.
 " WM. G. WOODWARD, } JUSTICES.
 " L. D. STOCKTON, }

FOLEY v. McKEEGAN.[1]

Whether the sum specified in a contract, as a penalty for the non-performance thereof, shall be considered as a penalty, or as liquidated damages, is a question of construction, on which the court may be aided by circumstances extraneous to the writing.

The subject matter of the contract—the intention of the parties—as well as other facts and circumstances—may be inquired into, for the purpose of determining the construction to be given to the contract, though the words used are to be taken as proved exclusively by the writing.

In giving a construction to such an instrument, the court must see whether the agreement contains one or several stipulations—whether such stipulations vary in importance—whether the damages are in their nature, certain or un-

4	1
89	728
4	1
94	683
4	1
98	243
98	381
4	1
111	696
4	1
117	289
4	1
126	723
4	1
138	125

[1] This case was decided at the December term, 1855, but was overlooked by some inadvertence, when the decisions of that term were prepared for publication.

Foley v. McKeegan.

certain, or difficult of definite ascertainment—or whether, where the injury is certain, the sum fixed upon, is proportionate or disproportionate to such injury, and the actual claim which grows out of it.

The terms applied by the parties to the sum fixed upon in the contract, will not always define and fix the action of the court in giving a construction to the contract.

Although the parties may call the sum fixed upon in the contract, a "penalty," or give it no name, or style it, "liquidated damages," the court in any or all of such cases, treat the sum as one or the other, depending upon the nature of the agreement, the surrounding circumstances, the intention of the parties, and the reason and justice of the case.

If, by the agreement, it is doubtful whether the parties intended that the sum specified, should be a penalty or liquidated damages, courts incline to treat the contract as creating a penalty to cover the damages actually sustained by the breach, and not as liquidated damages.

Where an action was brought upon a written agreement, which read as follows: "I, J. M., have this day agreed and sold, 200 acres of land, the same more or less, [here follows a reference to the lands,] for which I am to receive \$80.00; \$50 of which I am now to receive, and the same is to be forfeited by M. F., if he does not pay the balance, on or before the 10th day of April, 1854, and then I will give the deeds of the aforesaid places, at the time the money is paid. I, the said J. M., promise to give the said M. F. next April, together with the lands, [here follows several items of personal property,] and to put 500 rails on the fence of the field. I also bind myself under the penalty of \$50, to be paid to the said M. F., if I fail in the fulfillment of the aforesaid agreement; and to the aforesaid agreement, we both sign our hands;" and where the petition claimed damages for the non-performance of the contract; *Held*, That the sum inserted in the contract, to be paid on its non-fulfillment, was designed by the parties as a penalty, and not as liquidated damages.

Where an agreement contains covenants for the performance of several acts or things, and it fixes a specific sum at the end, to be paid upon a breach of performance, the sum so stated, must be regarded as a penalty; and where in a suit on such agreement, the plaintiff elects to proceed upon the covenants, and not to recover the penalty, the plaintiff may recover more or less than the amount of the penalty.

In an action against the vendor of real estate, for failing to convey, the measure of damages should depend upon the cause of the failure to convey.

If the party selling is honest, and was prevented from making the conveyance by unforeseen causes, which he could not control, the plaintiff should recover only nominal damages.

If the plaintiff has paid the price of the land, or any part thereof, and the defendant has failed to convey, from causes beyond his control, the plaintiff should recover the sum paid, with interest.

But if the person selling is in fault, and either did or should have known, that he could not comply with his undertaking; or having the title, refuses to convey, or having the title at the time of the agreement, afterwards disables him-

Foley v. McKeegan.

self from completing it, by a sale to a third person; or at the time of the agreement, knew he had no title; in these, and in all cases where the inability to convey, arises from fraud in the covenantor, the purchaser should recover substantial damages, including compensation for any actual loss, as by the increased value of the land at the time the contract should have been performed.

Where in an action to recover damages for the non-conveyance of real estate, on an agreement which contained the following provision: "I also bind myself under the penalty of fifty dollars, to be paid to the said M. F. (the plaintiff) if I fail in the fulfillment of the aforesaid agreement," and which agreement acknowledged the receipt of fifty dollars on the contract, the court instructed the jury, that by the terms of the agreement, the plaintiff was entitled to recover only one hundred and five dollars, being the fifty dollars paid by the plaintiff with interest, and the fifty dollars fixed as the penalty in the agreement; *Held*, That the instruction was erroneous, and that the penalty named in the agreement, was not the measure of the plaintiff's damages.

Appeal from the Jackson District Court.

THIS was originally a bill in chancery, to enforce the specific performance of the following agreement:

"Conditions of agreement between John McKeegan, on the one part, and Michael Foley on the other, May 5th, 1853. I, John McKeegan, have this day, agreed and sold 200 acres of land, the same more or less, (here follows a reference to the land,) for which I am to receive \$880; \$50 of which I am now to receive, and the same is to be forfeited by Michael Foley, if he does not pay the balance on or before the 10th day of April, 1854; and then I will give the deeds of the aforesaid places, at the time the money is paid. I, the said John McKeegan, promise to give the said Michael Foley, next April, together with the land, (here follows several items of personal property,) and to put 500 rails on the fence of the field. I also bind myself, under the penalty of \$50, to be paid to the said Michael Foley, if I fail in the fulfillment of the aforesaid agreement, and to the aforesaid, we both sign our hands.

"JOHN McKEEGAN.

"MICHAEL FOLEY."

The petition also claimed compensation, in the event that

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it should appear to the court, that plaintiff was not entitled to a specific performance. To this there was a demurrer, which was sustained, and plaintiff amended his petition, so that it now stands as an action at law to recover damages for the breach of said contract. The petition avers that plaintiff on the 10th of April, 1854, tendered the balance due on said agreement, with interest, and demanded a deed for the land, and the delivery of the personal property; that the defendant refused to receive said money, or to perform his agreement; that the land at the time of the tender, was worth \$1,300; and that the personal property was worth \$100.

The answer does not deny the agreement, the tender, or the value of the land or personal property, but denies that by the agreement, he sold plaintiff the land as claimed. The answer also denies the payment of any part of the price, but admits that defendant received from plaintiff fifty dollars, as a forfeit, if the plaintiff should elect not to abide by said contract. The answer also avers a tender of the said fifty dollars, together with interest, as also the fifty dollars mentioned in the conclusion of the agreement, as the penalty to be paid by defendant, if he failed in the fulfillment of the agreement on his part. This tender is admitted by the replication, and in all other particulars the answer is denied. On the trial, the plaintiff proposed to prove the value of the land and personal property, at the time he tendered the balance of the purchase money, which testimony was objected to, and the objection sustained. The plaintiff also claimed, that the defendant was estopped, from the state of the pleadings, from denying the value of the land and personal property, but the court held otherwise. It also appears that the court charged the jury, that by the terms of the agreement, the plaintiff was entitled to recover only one hundred and five dollars, being the fifty dollars with interest, paid by plaintiff, and the fifty dollars fixed as the penalty in the bond or agreement, to all which plaintiff excepted. It further appears, that an attachment was issued, but was, on motion of defendant, dissolved. Verdict for plaintiff for one hundred and five dollars. Judgment thereon, and he now appeals.

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Smith, McKinlay & Poor, for the appellant.

Ben M. Samuels, for the appellee.

WRIGHT, C. J.—Several errors are assigned, but they may all appropriately be considered under two heads:

First. Did the court err in sustaining the demurrer to the original petition?

Second. Was the construction given to the written agreement, as to the measure of plaintiff's damages, or the amount he had a right to recover, correct?

As to the first, we think plaintiff cannot now complain. Instead of standing by his original bill, he appears to have voluntarily abandoned it, submitted to the decision of the court on the demurrer, made his amendment, and went to trial on his claim for damages. By so doing, he has changed the whole form of his action, and it is now too late for him to claim a specific performance of the agreement. The defendant also claims that plaintiff had no right to so amend his petition, and that in permitting the same, the court erred. To this, a sufficient answer is, that defendant at the time made no objection, but took issue upon such amended petition, and went to trial upon the merits. It is now too late for him to object.

The second question is one of more difficulty. There can be no doubt, from the state of the pleadings, that plaintiff was estopped from denying the value of the property at the time of the tender. And this, because the value is distinctly averred in the petition, not denied in the answer, and is, therefore, admitted under our practice. But this can make no difference, if the construction given to the within agreement by the court below, is correct.

For if plaintiff can only recover the money paid, and the penalty named in the bond, then the value of the land and personal property, whether established by the pleadings or by the testimony of witnesses, becomes entirely immaterial. So that the sole question arises on the instruction given to the jury, as to the amount of plaintiff's recovery.

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There is much uncertainty in the application of the cases on this subject; and not by any means, an entire uniformity in the principles which have influenced the mass of decisions thereon. From all, however, we may deduce one point as settled. Whether the sum mentioned shall be considered as a penalty, or as liquidated damages, is a question of construction, on which the court may be aided by circumstances extraneous to the writing. The subject matter of the contract, the intention of the parties, as well as other facts and circumstances, may be inquired into, although the words are to be taken as proved exclusively by the writing. *Perkins v. Lyman*, 11 Mass. 76; 2 *Parsons on Contracts*, 439; *Saintes v. Ferguson*, 7 C. B. 716; *Brewster v. Edgerly*, 13 N. H. 275. In giving a construction also, we must see whether the agreement contains one or several stipulations; whether such stipulations vary in importance; whether the damages are in their nature certain or uncertain, or difficult of definite ascertainment; or whether, where the injury is certain, the sum fixed upon is proportionable or disproportionate to such injury, and the actual claim which grows out of it. 2 *Parsons on Cont.* 435; *Dennis v. Cummings*, 3 Johns. Cases, 297; *Astley v. Weldon*, 2 B. & P. 346; Phil. Ev. Vol. I, 167, (7th ed.); *Kemble v. Farrel*, 6 Bingh. 148; *Price v. Green*, 16 M. & W. 346; *Heard v. Bowers*, 23 Pick. 445. The terms applied by the parties to the sum fixed upon, will not always define and determine the action of the court in giving such construction. That is to say, though the parties may call the sum so fixed, a "penalty," or give it no name, or style it "liquidated damages," the court, in any and all such cases, treat the sum as one or the other, depending upon the nature of the agreement, the surrounding circumstances, the intention of the parties, and the reason and justice of the case. 2 *Parsons on Cont.* 438; *Harbrank v. Lappen*, 15 Johns. 200; *Chamberlain v. Bagley*, 11 N. H. 234; *Williams v. Daken*, 17 Wend. 447; *Carpenter v. Lockhart*, 1 Carter (Jud.) 434; *Beale v. Hayes*, 5 Sandford, 640; *Lindsey v. Anesley*, 6 Iredell, 186.

Another rule, fairly deducible from the authorities, is, that if by the agreement, it is doubtful whether the parties

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intended that the sum specified should be a penalty or liquidated damages, courts incline to treat the contract as creating a penalty to cover the damages actually sustained by the breach, and not as liquidated damages. *Taylor v. Sandiford*, 7 Wheat. 18; *Schute v. Taylor*, 5 Metc. 61; *Bagley v. Peddie*, 5 Sandf. 192; *Baird v. Tolliver*, 6 Humph. 186. And in the case of *Taylor v. Sandiford*, it is held, that the inference is much stronger in favor of its being a penalty, when it is expressly so reserved, and that it would require in such a case, strong evidence to authorize the court to say, that the parties have not, by their own words, expressed their own intention. See also *Hamilton v. Overton et al.*, 6 Blackford, 206.

A brief reference to one or two adjudicated cases, and we will then proceed to construe the instrument before us.

In *Davies v. Penton*, 6 Barn. & Cress. 216, A. agreed to sell to B. the stock and good will of his business, and to demise to him his house in which the business was carried on, for which B. was to pay £800, and to take the furniture and fixtures, at a valuation, which were afterwards valued at £174. At the time of executing the agreement, £400 was paid to A., and B. agreed to accept and pay two bills of exchange, one for £400, payable twelve months from date, and the other for £174, payable two months from date. And A. agreed not to carry on the business within five miles of the house; and for the true performance of this agreement, each of them did thereby bind and obligate himself to the other, in the penal sum of £500, to be recovered for a breach of the said agreement in a court of law, as and by way of liquidated damages. Held, by ABBOTT, C. J., and BAYLEY, HOLROYD and LITTLEDALE, Justices, that the sum was a penalty, and not liquidated damages. In *Lowe v. Peers*, 4 Barrows, 2227, the distinction between liquidated damages and a penalty to secure the performance of a contract, is expressed by Lord MANSFIELD: Says his lordship, there is a difference between covenants in general, and covenants secured by a penalty or forfeiture. In the latter case, the obligee has his election to bring an action for the penalty, after which he cannot resort

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to the covenant, or to proceed upon the covenant and recover *more or less than the penalty*. See also *Harrison v. Wright*, 13 East, 848.

In *Martin v. Taylor*, 1 Wash. C. C. R. 1, the action was covenant upon an agreement under seal. By the agreement, the parties, for the true and faithful performance of all the covenants therein contained, bound themselves, each to the other, in the penalty of £120, Virginia currency. It was objected that the £120 was in lieu of liquidated damages, and that as the plaintiff could recover no greater sum than that, the court had no jurisdiction of the case, that court having no jurisdiction where the demand was for less than five hundred dollars. The objection was overruled, however, and held that the action being in covenant, and not for the penalty, the plaintiff might recover more or less than the penalty.

In *Carpenter et al. v. Lockhart*, 1 Carter, (Ind.) 434, the action was covenant on an agreement, containing a number of stipulations, damages for the breach of some of which would be certain, and of others uncertain, and contained a mutual covenant that if either should fail, "in any particular, to abide by, observe and perform the above written agreement, or any article, clause, covenant, or promise, therein contained, by and on his or their part, to be observed, kept, &c.; the party so failing, shall pay the other party \$10,000, (and no greater or smaller sums,) as and for the damages occasioned by such failure." This sum was regarded as a penalty, and not as liquidated damages.

In view of the above general doctrines, and such as are deducible from the cases cited, we are of the opinion that the sum inserted in this contract, to be paid on its non-fulfillment, was designed by the parties as a penalty, and not as liquidated damages. In the first place, the parties have so expressly denominated it. And while the construction is not to be conclusively determined by their having so styled it, yet in the language of Ch. J. MARSHALL, in 7 Wheat. 13, "the inference is much stronger in favor of its being a penalty where it is expressly reserved as one." In the next

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place, this agreement contains more than one stipulation, or the defendant binds himself to do more than one act. And these stipulations differ materially in their importance. He binds himself to make a deed to two parcels of land, (or "places," as they are called in the agreement.) He also undertakes to put on the fence of the field, five hundred rails, and to deliver to plaintiff various articles of personal property. Suppose he performed his agreement as to the land, and delivered all the personal property, except the five bushels of potatoes, or the two pigs therein named, it would be manifestly unjust and oppressive to require him to pay the fifty dollars named.

And on the other hand, suppose he had performed the unimportant parts of the agreement, and failed to convey the land, is the measure of the plaintiff's damages the same? The answer must readily be, that in the one instance it would be too high, and in the other it might be too low. But again, if he fails entirely to perform either of his covenants or stipulations, the reason is still stronger why the damages should be different, than if he failed in an unimportant, or any one important particular. On this subject, see *Astley v. Weldon*, 2 Boss. & Pull. 346. It is there stated, that where articles contain covenants for the performance of several things, and where one large sum is stated at the end to be paid, upon the breach of performance, that must be considered as a penalty. So in *Davies v. Penton*, above cited, says BAYLEY, J., where the sum which is to be the security for the performance of an agreement to do several acts, will in case of breaches of the agreement, be in some instances too large, and in others too small for the injury thereby occasioned, that sum is to be considered a penalty. See also *Jackson v. Baker*, 2 Edw. Ch. 471. And again, the damages to arise from a breach of some of the stipulations of this contract, if not all, are not uncertain, but may be ascertained by evidence. The consideration for the defendant's undertaking is disclosed, and the motives that influenced the contract. And in this and other particulars, this case differs from that of *Hamilton v. Overton et al.*, 6 Blackford, 206. In that case, there was but one cove-

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nant, and from its nature the damages for a violation of it, were entirely uncertain, and could not be ascertained by evidence. It also appeared that the parties had expressly stipulated that the sum named should be "liquidated damages," and it was so regarded. As to the rule on this subject, see 2 Parsons on Contracts, 435; *Kemble v. Farrer*, 6 Bingh. 148; *Beale v. Hayes*, 5 Sandf. 640. We conclude, therefore, that the sum named in this agreement, is not the measure of the plaintiff's damages, but must be treated as a penalty.

The plaintiff has elected to proceed upon the covenants, and not to recover the penalty, and such recovery under the authorities cited above, may be more or less than the penalty. And further on this subject, see *Brown v. Bellows*, 4 Pickg. 178; 2 Greenl. Ev. § 257. And this brings us to consider the rule of damages in such cases. It will be observed that this case is distinguishable from that class of cases that discuss the measure of damages in covenants of warranty, and in covenants of seizin. In such cases, the authorities are uniform as to the true measure in covenants of seizin, but not where the action is upon the covenants of warranty. In the latter case, in Massachusetts, Connecticut, Maine, Vermont, and South Carolina, and perhaps some other states, the measure is the value of the land at the time of eviction. In New York, Kentucky, Pennsylvania, New Jersey, Ohio, Georgia, North Carolina, Tennessee, and Virginia, the measure is the purchase money, with interest. In the former case, we believe it to be uniformly held, that the measure of damages is the purchase money and interest. *Marston v. Hobbs*, 2 Mass. 433; *Bickford v. Paige*, Ib. 485; *Gore v. Bragier*, 3 Mass. 543; *Cushman v. Blanchard*, 2 Greenl. 266; *Sterling v. Peet*, 14 Conn. 245; *Park v. Bates*, 12 Vermont, 387; *Werting v. Niseley*, 13 Penn. 650; *Clark v. Parr*, 14 Ohio, 118; *Bennett v. Jenkins*, 13 Johns. 50; *Holmes v. Simickson*, 3 Green, (N. J.) 313; *Pence v. Duvall*, 9 B. Mon. 48; *Shaw v. Wilkins*, 8 Humph. 647. When the action is brought as in this case, on a contract to sell, against the vendor, who has failed to convey, we find much difficulty in determining the measure of damages upon authority. As damages are given as

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a compensation or satisfaction to the plaintiff for an injury received from the defendant, reason and exact justice would seem to dictate, that he should not in all such cases be confined to the consideration money and interest, for frequently the interest upon the money paid, is but the smallest fraction of the amount of injury actually sustained. On the other hand, quite as much injustice may result by holding that in all cases, the plaintiff is entitled to the appreciated value of the land, at the time the conveyance should have been made. May a rule be recognized, then, which shall have for its basis the giving of compensation for the injury, and at the same time avoid injury to a vendor, who acts in good faith? We believe there is such a rule sustained by authority and reason, and which while it may not in all cases, make the plaintiff whole or give him full satisfaction, will approximate it, and be as just and equitable as is consistent with most general rules. We believe that the measure of damages should depend upon the cause of the failure. If the person selling is honest, and prevented from making the conveyance by unforeseen causes, and which he could not control, the plaintiff should recover only nominal damages. If he has paid the price, or any part thereof, then, of course, in such a case, he should recover that sum with interest.

But if the person selling is in fault, and either did or should have known that he could not comply with his undertaking; or having the title, refuses to convey; or having title at the time of the agreement, afterwards disables himself from completing it, by a sale to a third person; or at the time of the agreement knew he had no title, in these and in all cases where the inability arises from fraud in the covenantor, the purchaser should recover substantial damages, "including compensation for any actual loss, as by the increased value of the land at the time the contract should have been executed." And without referring to the authorities in detail, to sustain this view, we cite the following: *Hopkins v. Lee*, 6 Wheat. 109; *Nichols v. Freeman*, 11 Iredell, 99; *Bryant v. Hambruch*, 9 Geo. 133; *Whitensides v. Jennings*, 19 Ala. 784; *Hill v. Hobart*, 16 Maine, 164; *Warren v. Wheeler*, 21

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Maine, 484; *Buckmaster v. Grundy*, 1 Scam. 310; *McKee v. Brander*, 2 Scam. 339; *Carmell v. McLean*, 6 Har. & J. 297; *Hopkins v. Gaybrook*, 13 Eng. Com. Law, 100; *Driggs v. Dwight*, 17 Wend. 71; *Peters v. McKeon*, 4 Denio, 546. And also see *Fletcher v. Button*, 6 Barb. 646. In this last case, the question did not arise, but it is fairly intimated, that plaintiff would not, in all actions brought on a covenant to convey, be confined to the purchase money paid and interest. And we may also remark, that many of the above cases hold that the measure of damages will not be influenced by the question of fraud in the covenantor, but the same rule applies to bargains respecting lands, as in those in actions for the non-delivery of chattels. Others again do admit the distinction. It is recognized by Mr. Parsons in his late work on Contracts, (Vol. II, 505.) And we believe it to be eminently just and proper.

That there are authorities holding a contrary view, we are well aware. But on the contrary, where land is so much an article of trade in the market—where its value so rapidly appreciates—where our citizens are constantly investing their means therein, for purposes of legitimate profit and speculation—we see no reason why they should not have the expected benefit of their investments, where the covenantor, by his own wrongful act, deprives the purchaser of the land. The obligor binds himself to convey the land. Equity from the time of the agreement, regards the land as belonging to the purchaser, and the money as belonging to the vendor. And in case of dishonesty, every principle of right would dictate that the purchaser should have the benefit of his bargain.

If the vendor so elects, he may specifically execute his agreement, and thus avoid damages. In such cases, the vendor gets what he contracted for. And ordinarily this is what he should have. So, on the other hand, it is true that the vendor may file his bill for a specific performance. But he is not always compelled to do so, and in some cases his suit would be fruitless, the vendor having parted with the title to an innocent holder. The case of *Stewart v. Noble*, 1 G.

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Greene, 26, does not conflict with the foregoing conclusion. The covenantor in that case died in a short time after making the agreement, and in such case the purchase money, with interest, we think, would be the proper measure of damages. It is urged in the argument by appellant, that the court erred in dissolving the attachment. The assignment of errors does not point to this objection, however, and it cannot therefore be considered. The court below having erred in the construction given to the contract declared upon, and in the charge to the jury, as to the measure of damages, the judgment must be reversed.

Judgment reversed.

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Section nineteen of the act entitled "An act to authorize general incorporations," approved February 22d, 1847, which provides that when no corporate property can be found, on which to levy execution against the corporation, the acting manager, or some member of the company, may be notified to appear before the District Court of the county where the judgment was obtained, and show cause why the individual property of the members of the company should not be made liable, is not unconstitutional or unreasonable.

It was not the intention of the statute, to drive the creditor to the inconvenience, expense and delay of suits against all, or any of the stockholders, after he had obtained his judgment against the corporation.

The proceedings and judgment of a court, within its jurisdiction, cannot be inquired into and set aside, in a collateral proceeding.

Where a judgment is obtained against a corporation, and an order is obtained that execution be levied on the individual property of the members thereof, the execution should follow the judgment, and run against the corporation, with a clause that it be levied on the property of the members.

Where in a proceeding for an injunction, it appeared that W. obtained a judgment in the District Court, against a corporation organized in 1851, upon which execution issued, which was returned, "no corporate property can be found, sufficient to satisfy the same;" that notice was served upon the president and several of the directors of the company, to show cause why the individual property of the members should not be made liable, and such proceedings were had, that the court rendered judgment that an execution issue against the property of the members; that an execution issued against cer-

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tain individuals, as members of the corporation, naming them, who sued out the injunction, staying the execution and all proceedings under it, which injunction was dissolved by the District Court; and where the reasons stated in the application for the injunction, were as follows: 1. That the private property of the members of the corporation, was exempt; 2. That the proceedings to render the stockholders liable, should have been conducted under the Code, and not under the act of 1847; 3. That the court could not render the stockholders liable for more than the amount of their stock; and 4. That they were liable, even to the company, only on certain conditions; *Held*, 1. That all the grounds stated in the application for the injunction, were questions for the court to determine, before it ordered execution to issue against the individual property of the stockholders, and its judgment upon them was conclusive, unless appealed from; 2. That the execution issued against the individuals was irregular, and was properly stayed by the injunction; 3. That the court erred in dissolving the injunction.

Appeal from the Jefferson District Court.

THE Fairfield and Mount Pleasant Plank Road Company, was organized as a corporation, in April, 1851. J. C. Weare obtained judgment against that company, in the District Court, in Jefferson county, at the October term, 1853. An execution was issued against the company, and in February, 1854, the sheriff returned that no corporate property could be found, in accordance with the act of 22d February, 1847, § 19, (Stat. 1847, 103). Thereupon, in pursuance of the same section, a notice was served upon the president and several of the directors of the said company, to show cause why the individual property of the members should not be made liable, and such proceedings were had in the cause, that the court rendered judgment that an execution issue against the property of the members. Such an execution issued against certain individuals, as members, naming them, and an injunction was sued out, staying the execution and the proceedings under it. The injunction was granted by the county judge of Jefferson county, and a motion to dissolve it was made in the District Court, which motion was granted. This appeal is from this judgment, dissolving the injunction.

J. F. Wilson and Knapp & Caldwell, for the appellants.

Clinton & Baldwin, for the appellees.

WOODWARD, J.[1]—The first question is, whether the injunction was properly granted. The District Court had jurisdiction of the subject matter, and personal service was made on the president and several directors of the corporation. Thus far, therefore, there is no question. But the petitioners complain that in the proceeding to charge the members of the corporation, they had no notice, and, therefore, as we understand, they intend to infer that the judgment ordering execution against them, is invalid. The Constitution, (Art. 8, § 2,) provides that: "The stockholders (of corporations) shall be subject to such liabilities and restrictions as shall be provided by law." By the common law, the stockholders of a corporation were not liable for the debts of the corporate body. This provision of the constitution was undoubtedly intended to render them liable in such degree and manner as the legislature should see proper. The legislature has accordingly directed that in such case, the officers of the corporation shall be summoned in, to show cause why the property of the members should not be held liable. These officers or managers, are chosen by the members, and would always, probably, be stockholders themselves, and so liable with others, so that the interest of all is, in some fair measure, represented. The statute did not intend to drive the creditor to the inconvenience, expense, and delay of suits against all or any of the stockholders, after he had obtained his judgment against the corporation. We do not regard this provision of the law as either unconstitutional or unreasonable. The District Court having acquired jurisdiction, all the other questions suggested by the complainant, were within the province of that court to decide. It is not very clear that this court need to have noticed the above question concerning the proceedings in connection with the constitution, but we have adverted to it so as to leave no doubt. The other grounds upon which the application for an injunction was based, were the following: That the private property of the

[1] WRIGHT, C. J., having been of counsel, took no part in the decision of this cause.

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members was exempt. This involved a judicial construction of §§ 6 and 26, of the act of 1847. Another was, that the proceedings, to render the stockholders liable, should have been conducted under the Code, and not under the act of 1847. Supposing them different, this admits of a question. A third was, that the court could not render them liable for more than the amount of their stock. A fourth ground was, that they were liable, even to the company, only on certain previous conditions, such as the advertisement of the calls for installments. It is very manifest that all these questions were for the court to determine before it rendered judgment that execution issue, and that its judgment upon them, is conclusive, unless an appeal be taken. The proceeding now before us seeks to convert a bill praying for an injunction, into a writ of error, to inquire into and correct the proceedings and judgment of the District Court. It does, as is alleged by counsel, seek to go behind the judgment of the court awarding the execution against the property of the members. And this is a judgment, quite as much as the judgment for the debt, against the company. The proceedings and judgment of the court within its jurisdiction, cannot be inquired into and set aside in this manner. See 1 Pet. 328; *Elliot v. Piersoll*, 2 Pet. 157; *Thompson v. Tolmie*, 3 Pet. 193; *Ex parte T. Watkins*, 6 Pet. 691; *U. States v. Arredondo*, 10 Pet. 473; *Voorhees v. The Bank of United States*, 2 Howard, 319; *Grignon's Lessee v. Astor et al.*, 11 M. R. 227; *Wright v. Marsh et al.*, 2 G. Greene, 95.

The case has been unfortunately delayed in this court, through causes which no one could control. One of the members of the court having been of counsel, could take no part in its adjudication. The other two differed in opinion, upon some of the questions presented. A change having taken place, it is desired to bring the suit to a close. Whilst the causes assigned by the petitioners for injunction as grounds for its dissolution, either are not sufficient for that effect, or do not come to us in such manner that we can properly consider them, yet there is one, not presented, which is worthy of notice. The judgment was recovered against the corporation,

and not against individuals. But such proceedings were had, that in accordance with the statute, as we may for the present assume, the court rendered judgment (or ordered) that an execution issue against the property of the members. But there is no judgment against persons as members. There is no adjudication that certain persons were such. The execution, therefore, should follow the judgment, and run against the corporation, with a clause that it be levied on the property of the members. The clerk should not undertake to adjudicate on their membership, by causing the execution to run against them personally, but should leave the officer to ascertain who are members, as he may. And thus leave the party also to his proper remedy, if he believes himself not liable, or to his other proper course, if he is liable. The execution was, therefore, irregularly issued, and for this reason, at least, was properly stayed by the injunction. Although one of us is not entirely satisfied with this view, nevertheless, as the cause comes to us in a manner unfavorable for reaching some of the questions, and as the object of this particular proceeding has passed by, we have concluded to place it upon the foregoing ground, hoping that if another case is presented upon the same matters, we shall be able to reach the true questions, and shall have the benefit of a full bench in their consideration. The judgment of the District Court in dissolving the injunction, is reversed.

LANGWORTHY v. MYERS *et al.*

There may be possession *in fact*, of unimproved and uninclosed land.

One who enters on land, intending to take possession of the entire tract, no part of which is held adversely at the time of the entry, is in possession to the extent of his claim.

An entry upon land, with the intention of clearing and fitting it for cultivation, is such an entry as that the jury may be authorized to infer actual possession from it.

Where in action of forcible entry and detainer, the plaintiff, for the purpose of establishing actual possession of the premises, proved that in the spring of 1854, he had the premises, which were uninclosed, surveyed, and a map made; that at the same time, stakes were set at the corners, and the trees blazed on the boundary lines; that a portion of the ground was also subdivided and laid off into smaller lots; that stakes were set up at the corners of respective lots, rendering the boundaries visible, in the usual way of laying out town lots; that a street was also made through the adjoining land of the plaintiff, which was graded so as to extend some five or seven feet on the premises in dispute; that the trees and under brush growing on the premises where the street was opened, were cut off and hauled away by the plaintiff; that the plaintiff claimed to own some of the adjoining lots; and that he had sold lots adjoining the premises in dispute, to different persons; and where the court instructed the jury, that *actual possession* of real estate may be shown by any act of possession, as where the owner goes upon the land to take possession, or to exercise any other act of ownership; and if they believed that the plaintiff exercised over the premises those acts of ownership usually exercised by owners over land on which they do not actually reside, they might infer *actual possession*; and that it was not necessary to such *actual possession*, that the premises should be surrounded by a fence, or built upon; and where the jury found that the plaintiff was in the *actual possession* of the premises, which verdict the court refused to set aside on motion; *Held*, That the instruction was correct, and that there was sufficient evidence to justify the jury in finding that the plaintiff had actual possession of the premises at the time of the entry by the defendants.

Where certain instructions in writing were asked by the defendants, and the court, when the jury was about to retire, handed them to the jury without reading, with the information that they were given as asked, all of which was done without objection; and where the defendant moved to set aside the verdict, for the reason among others, that the court did not give the defendant's instructions, nor read them to the jury, which motion was overruled: *Held*, That the objection to the manner of giving the instructions, was too late after verdict, and that in the absence of objection, it must be presumed to have been done by consent.

Either party is entitled to have the instructions read to the jury before they retire, and such is the better practice; but if neither party require it to be done,

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and suffer them to be handed to the jury, supposing that they would be read by the jury, it is too late after the verdict is rendered, to assign the same for error, or make the failure to read the instructions to the jury, the ground of a motion to set aside the verdict, and grant a new trial.

The conduct and behavior of the jury before they retire to consider of their verdict, being in the presence of the court, is presumed to be under its control, and subject to its reprehension or punishment, if in violation of good order, or wanting in due respect to the court, or its counsel.

To justify the court in setting aside a verdict, on the ground of the misbehavior of the jury, whether before or after the cause is submitted to them, the alleged misconduct should clearly satisfy the mind of the court, that a fair and impartial trial has not been had, and that the verdict is contrary to the law and the evidence.

Where in an action of forcible entry and detainer, the court instructed the jury as follows: "1. That if the jury believe that there were indications upon the ground in dispute, at the time defendants took possession, of its being controlled and actually possessed by some other person, it was sufficient to put defendants upon inquiry, and they had no right to take possession of the land while it seemed to be in the possession of another person. 3. If the jury believe that defendants took possession secretly, and in such way as to avoid observation, they are authorized to believe that defendants meant to acquire an undue advantage, by which they ought not to be benefited. 8. That if the jury believe that defendants procured a surveyor to run out said lots, under an injunction of secrecy; that they on the same day followed close on the heels of the surveyor, with loads of boards and posts; that they commenced the construction of a hasty unsubstantial fence, on the side most out of view from the city; that they built and finished such fence in the utmost haste; that they put up in the same manner, a shanty of boards upon the lot, out of sight among the trees; that these improvements were made with the utmost secrecy and expedition, the jury are authorized hence to infer that the entry of defendants upon said premises, was by fraud and stealth." *Held*, That the instructions were legal and proper.

Appeal from the Dubuque District Court.

THIS was an action of forcible entry and detainer, brought by Langworthy, to recover of defendants the possession of a lot in the city of Dubuque, designated on the plat of the city, as the "grave-yard lot." The action was first tried before a justice of the peace, and resulted in being appealed to the District Court. Numerous instructions were given by the court, as asked by each party, and a verdict was again returned in favor of plaintiff, which defendants moved the court to set aside, for various reasons, which are noticed in their order, in the opinion of the court. The court refused

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to set aside the verdict and grant a new trial, and judgment was rendered for the plaintiff, from which defendants have appealed to this court, assigning for error, that the court erred in ruling that there was sufficient evidence of possession, to sustain the verdict, and in overruling the motion for a new trial.

The evidence relied upon to sustain the verdict, as well as the reasons urged for a new trial, so far as they are deemed important and essential, are given in the opinion of the court.

Smith, McKinlay & Poor, and Nightengale & Wilson, for the appellants.

Wiltse & Blatchley, and Burt & Barker, for the appellee.

STOCKTON, J.—The first question to be considered is, whether the court should have granted the motion of defendants, to set aside the verdict and order a new trial.

The first and second reasons urged are, that there was no evidence tending to show that Langworthy, the plaintiff, was in the actual possession of the premises at the time of the alleged entry by defendants, and that the verdict was contrary to the evidence and the instructions of the court. The evidence set forth in the bill of exceptions, shows that Langworthy, in the spring of the year 1854, had the premises surveyed and a map made, and at the same time stakes were set at the corners and the trees blazed, on the boundary lines; a portion of the ground was also subdivided and laid off into smaller lots; and stakes were set up at the corners of respective lots, rendering the boundaries visible, in the usual way of laying out town lots. A street was also made through the adjoining land of the plaintiff, which was graded so as to extend some five or seven feet on to the premises in dispute. The trees and under brush growing on the premises when the street was opened, were cut and hauled away by the plaintiff. It also appeared that plaintiff claimed to own some of the adjoining lots, and that he had sold lots adjoining the premises in dispute, to different persons.

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We do not understand that the defendants have excepted to the instructions given by the court to the jury. And the question is, whether this evidence under the instructions, was sufficient to authorize the verdict of the jury. In other words, was it such as to authorize them in finding that the plaintiff was in the actual possession of the premises? It is admitted, that up to the time of the grievances charged to have been committed by defendants, the premises were not inclosed, and no house was built upon them. But the jury were not bound from that fact to infer, that plaintiff could not have been in the actual possession of the lot. There may be possession in fact, of unimproved and uninclosed land. *Wall v. Nelson*, 3 Littell, 398. The doctrine is well settled, that one who enters on land, intending to take possession of the entire tract, no part of which is held adversely at the time of entry, is in possession to the extent of his claim. *Robert v. Long*, 12 Ben Monroe, 195; *Campbell v. Thomas*, 9 id. 88. An entry upon land, with the intention of clearing and fitting it for cultivation, is such an entry, as that the jury may be authorized to infer actual possession from it. *Humphrey v. Jones*, 3 Monroe, 261. The rulings of the court, coincide with our own views of the law upon the question of what is sufficient to constitute *actual* possession. And as we think there is sufficient evidence, to justify the jury in finding that Langworthy had actual possession at the time of the entry by the defendants, we think the court did not err in refusing to set aside the verdict. *Bell v. Longworth*, 6 Ind. 274.

Nor do we think, that the verdict is against the instructions of the court. The jury, we think, were properly told by the court, that the *actual* possession of real estate may be shown by any act of possession, as where the owner goes upon the land to take possession, or to exercise any other act of ownership; and if they believed that the plaintiff exercised over the premises, those acts of ownership usually exercised by owners over land, on which they do not actually reside, they might infer *actual* possession; and that it was not necessary to such *actual* possession, that the premi-

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ses should be surrounded by a fence, or built upon. *Bell v. Longworth*, 6 Indiana, 274. The premises, it is shown, lie adjoining other lands claimed by plaintiff. He had procured the same to be surveyed, the boundaries marked, and stakes to be set up at the corners. He had subdivided the same into smaller lots, and staked them off in the usual manner of laying off town lots, so that the corners and boundaries were visible, and had been offering them for sale. These were all acts from which the jury were told that they were authorized to infer the possession of the land by the plaintiff; and having found that they amounted to actual possession, we think the court did not err in refusing to set aside the verdict.

The third and fourth reasons assigned why the court should have granted a new trial, are, that the court did not give the jury the instructions asked by defendants; and did not read the same to the jury. It appears, that the instructions, twenty in number, were in writing, and as the jury were about to retire, the written instructions asked by defendants, were handed to them, and they were informed that they were given as asked. This was done without objection by either party, and in the absence of such objections, it will be presumed to have been done by consent. Either party is, without doubt, entitled to have the instructions read to the jury before they retire; and such is, no doubt, the better practice. But if the defendants, as in the present cause, did not insist upon the instructions being read by the court, and suffered them to be handed to the jury, supposing that they would be read by them, it is too late, after the verdict is rendered, to assign the same for error, or make the failure to read the instructions to the jury, the ground of motion to set aside the verdict, and grant a new trial. The court, undoubtedly, might well presume that the defendants consented to the course adopted, and waived the reading of the instructions to the jury.

The fifth and seventh reasons urged why the verdict should be set aside, are for alleged improper conduct on the part of the jury. It is charged that some of the jurors paid

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no attention whatever to the law or evidence, and were reading newspapers during the progress of the trial, and while defendants' counsel were making their speeches. It is further alleged and shown by the affidavit of one of the jurors, that after retiring to consider of their verdict, the jury did not have the instructions read, which were asked for by defendants, and marked "given" by the court; that a juror asked to have them read aloud, to which request others answered, that it was not necessary to read them, and that the charge of the judge was enough; that the verdict was formed without the instructions being read aloud, and without all the jurors reading them for themselves; and that only a few of the jurors read the instructions.

While we would not wish to be understood as in the slightest degree approving or countenancing the alleged misconduct of the jury, we do not see that such alleged misconduct is inconsistent with their having found a verdict in accordance with the facts and the law. The conduct and behavior of the jury, before they retire to consider of their verdict, being in the presence of the court, is presumed to be under its control, and subject to its reprehension or punishment, if in violation of good order, or wanting in due respect to the court or its counsel. But the court should be clearly satisfied that by such misbehavior of the jury, whether before or after the cause is submitted to them, a fair and impartial trial has not been had, and that the verdict is contrary to the law and the evidence. The District Court refused, in the present instance, to set aside the verdict, for the reasons and upon the facts presented. We are not disposed to disturb its decision. We have expressed an approval of the verdict, upon the law and the testimony; and although instructions were given which may not have been read by all the jurors, we do not perceive that those they failed to read, were in any essential point in contradiction of the written charge of the court, or the instructions asked by plaintiff; or that the conclusions of the jury ought to have been changed, had the instructions received from them a more careful and attentive consideration.

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The last reason urged by defendants, why the verdict should be set aside, was that the court erred in giving the first, third, sixth, seventh and eighth instructions, asked by plaintiff. These instructions were as follows :

1. That if the jury believe that there were indications upon the ground in dispute, at the time defendants took possession, of its being controlled and actually possessed by some other person, it was sufficient to put defendants upon inquiry, and they had no right to take possession of the land, while it seemed to be in the possession of another person.

8. If the jury believe, that defendants took possession secretly, and in such way as to avoid observation, they are authorized to believe that defendants meant to acquire an undue advantage, by which they ought not to be benefited.

6. That if the jury believe that Langworthy exercised, with reference to said premises, those acts of ownership usually exercised by the owners of land, over lots upon which they do not actually reside, they may infer actual possession.

7. That it is not necessary to the existence of actual possession of a lot, that it should be surrounded by a fence, or that it should be built upon.

8. That if the jury believe that defendants procured a surveyor to run out said lot, under an injunction of secrecy ; that they on the same day followed close upon the heels of the surveyor, with loads of boards and posts ; that they commenced the construction of a hasty unsubstantial fence, on the side most out of view from the city ; that they built and finished such fence in the utmost haste ; that they put up in the same manner, a shanty of boards upon the lot, out of sight among the trees ; and that these improvements were made with the utmost secrecy and expedition ; the jury are authorized hence to infer, that the entry of defendants upon said premises was by fraud and stealth.

We have before indicated our approval of the interpretation of the law, as given by the court in the sixth and seventh instructions. See Swan's Treatise, 465 ; Cowen's Treatise, 414 ; 14 Wendell, 239.

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The other instructions, we do not think, were in any respect improper, and even if erroneous, they could not have misled the jury to the prejudice of the defendants' rights. But, as legal propositions, we think they are true; and that if defendants had reason to believe the premises were in possession of any other person, they had no right to take possession of the same themselves; that they ought not to be benefited by any undue advantage taken by them; and that the jury may be authorized from the facts set out in the eighth instruction, to infer that the entry of defendants upon the premises, was by fraud and stealth. Judgment affirmed.

This cause was heard and decided at the June term, 1856, at which time a petition for a rehearing was filed by the appellant, and continued for argument. At the December term, 1856, the following arguments were made, and opinion filed.

Smith, McKinlay & Poor, and Nightengale & Wilson, for the appellants.

There are several points which arise in the case. The first and most important one is, what is the meaning of the words *actual possession*, as used in the chapter of the Code, relating to forcible entry and detainer? *Possession* is a word derived from the civil law. *Seizin* is the word which more appropriately belongs to the common law. The words being nearly identical in meaning, they have occasionally been used the one for the other, and confusion has arisen in their use and meaning. Even the writers of the civil law have disputed much over the law of possession. We find the following laid down in Kaufmann's *Mackeldey*, which is a work of great merit. He is speaking of *judicial possession*:

"The acquisition of judicial possession always requires: 1. Apprehension of the thing; that is some physical or corporeal act, (*corpus*,) by means of which, he who intends to acquire, brings himself into such a relation to the thing, that he may subject it to his exclusive control. 2. This apprehension must be accompanied by a certain intention (*animus*)

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to consider the thing as his own. Wherever both exist, possession is acquired; one without the other, will not suffice."

"The judicial possession of land (*fundus*) which has before been in the possession of another, cannot be acquired by the mere fact of apprehension; for besides this, it is requisite that the last possessor should have received notice of such apprehension, and either yielded willingly or had been expelled forcibly by the other.

"We have seen, (pp. 239, 241,) that the acquisition of possession requires two acts, viz: a corporeal and a mental one. The continuance of possession, however, does not necessarily suppose a continued corporeal relation to the thing, but may be maintained by a continued *animus possidendi*, alone. As to the loss of possession, it is true, this must be effected by a *contrarium actum* with respect both to the *corpus* and *animus*, that is, by an abandonment or deprivation of the detention, and an abandonment of the will to possess.

"As regards the corporeal relation to the thing, the continuance of possession does not depend on that immediate physical dominion over the thing, which is necessary to its acquisition, but it is sufficient if the possibility exists of reproducing such dominion at pleasure at any time. Hence a man does not lose the possession of a thing which he has once acquired, by a mere separation from it; and consequently he can exercise detention also, through the medium of another. Possession is not terminated, until by means of some fact or other, it has been made *impossible* for the possessor to exert a physical dominion over the thing.

"As regards the *animus*, it is not necessary that the possessor should be conscious of it at every moment; for the possession is not lost *by will (animus)* until the possessor comes to the contrary determination, and positively gives up the *animus possidendi*; (*si in contrarium actum est*)."

That is the kind of possession that is sometimes called actual possession in our books, but it is not really actual possession, as we will show in another place. But it is a poor rule that will not work both ways. Langworthy claims to

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be in possession in October, 1854, because of acts done in June, 1854, and previous to June in that year: The defendants, however, (or rather the principal defendants,) occupied the premises from the fore part of the year 1836, and for several years subsequent thereto, as mineral grounds; they made the old diggings which appeared upon the premises; they spent about five thousand dollars in digging and improving the premises, in the way that miners ordinarily do. Where was the evidence that defendants had given up the *animus possidendi*? Their continuance of possession did not depend on their immediate physical dominion over the land; it was sufficient if the possibility existed of reproducing their dominion at pleasure at any time. The facts in this case, show that the possibility did exist, and that there was no breach of the peace in the production of dominion. Langworthy does not even charge that against them. Langworthy's acts in surveying, &c.,—that is to say, his *apprehension*—did not give him possession, because the defendants, the last possessors, received no notice of his apprehension; nor did they yield willingly; nor were they expelled by force.

The words "*actual possession*," have two separate and distinct meanings, which should not be confounded; yet some courts have confounded them, but we trust this court will not follow such examples. "*Actual possession*," is used as opposed to "*constructive possession*," such possession as the law construes to be in a man when there is no real possession. In this sense of the words *actual possession*, the possession of my *tenant*, agent or steward, is *my* "*actual possession*,"—that is to say, *the possession is actual and not constructive*. The possession of lands adjoining a tract in dispute, may by law be *construed* to extend over that in dispute, but in such case, the possession is *constructive*, not *actual*. In order to authorize its being called *actual possession* of the whole, it would have to be shown that they were not two tracts, but a whole tract, and had been so treated from the time of taking possession of any part, then such possession, *when continued*, might reasonably be called *actual possession* of all.

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Actual possession is often used for actual seizin, as distinguished from *constructive seizin*. A man who had acquired title to land was construed to have seizin of it; but it required *actual seizin*; there must have been a livery of seizin to him, in order that his widow should be entitled to obtain dower. In all these cases, *actual* is used as opposed to *constructive*.

But *actual possession* has another meaning. It means a possession continued from day to day; such a possession as when it is interfered with, needs a summary remedy; one where the person injured needs immediate reparation. It is because of the need of this summary remedy, that a case may be tried on two days' notice only. (Code, § 2368.) My tenant may maintain an action against me for a forcible entry on my own land, because though in one sense, his possession is my possession, yet it is *he* that has the actual possession from day to day, and has right to be speedily restored thereto, if I interrupt him in it, either by forcibly turning him out, or by watching till he goes to market to buy his victuals, and then slipping into the premises. This is the sense in which *actual possession* is used in the Code. Such a possession as needs a summary remedy for an interference with it, is a continuous—day to day—possession, one in which an ordinary action of trespass would not afford a sufficient remedy.

The Code says, "*prior actual possession of another.*" Had Langworthy such a prior actual possession, as required the summary remedy to be administered by a justice of the peace? Certainly not; his last act of possession was in June. The defendants went in October, to survey their lot, and build their fence and cabin. That is, Langworthy had been able to do without actual possession for nearly four months; he could have done without it a little while longer, and taken his remedy in the ordinary course, without resort to a summary proceeding before a justice.

It appears from the evidence—all contained in the bill of exceptions—that the defendants had spent about five thousand dollars in mining, upon the premises, between the years

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1839 and 1844, and that the ground was otherwise unimproved and unoccupied, until the spring of 1854, when Langworthy caused it to be surveyed into town lots, and staked out in the usual way. He graded a street up the hill to this lot, and five to seven feet on to it, and cut out the small timber the width of the street through the lot. He caused two loads of poles to be hauled to his house a mile and a half distant, and another load was stolen by some person unknown. This was the latter part of May or first part of June. On the 4th of October following, the defendants inclosed the place with a post and board fence, and built a cabin. There was no person there at the time; the ground was vacant and unimproved except as aforesaid. About three days after they went there to build the fence, Langworthy and his son came up the street, and were about to let down the bars and go into the inclosure, when defendants came out of the brush, and informed them that they were there for Myers, and that they would defend it at the cost of their lives. Langworthy went inside the inclosure, set up a couple of posts, went away and came back and found them pulled up; then demanded possession, and brought this action.

The defendants were as much in the possession of the place as Langworthy; they at one time expended large sums of money in mining upon the lot, and their mining shafts were still there. Langworthy's acts were not such as they would be likely to see, unless they had been actually on the premises from time to time; the making of a road through adjacent land, and the setting of stakes, and blazing of trees, are not such acts as would call attention from viewing the premises at a distance, and Langworthy's acts could only give notice of an interference with the defendant's rights, by the defendants, or some of them, actually visiting the land.

Langworthy purchased the adjoining lands from the defendants; he had a right to put stakes along the boundaries of his purchase; he had a right to lay out streets through his purchase, and lay off lots on each side of the streets; but he had no right to go on defendants' land, and set stakes,

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blaze trees, and cut brush, and his possession of his neighbor's land, cannot and should not extend beyond the time he is *actually* there. It is only a real *actual* possession that is protected by the forcible entry and detainer act, and not a possession, construed to continue, because of certain acts done on another's land several months previous. It is true, the court ruled out the title papers, and so there was nothing before the jury to show the extent of the plaintiff's rights; nothing to show but that his acts were trespasses on the lands of others. The answer denies that plaintiff had actual possession of the lot or any part; denies that plaintiff was in possession of the land on the east or on the north; denies that the same was parcel of the same premises; denies that he remained in possession, &c. There was no proof that they were parcel of the same premises, and, therefore, it is only the acts done on the lot itself, that could have anything to do with the case. And we say the proof did not amount to proof of such actual possession as is intended to be protected by the summary remedy by forcible entry and detainer.

"Where the possession of land is relied upon for any legal purpose, in the absence of paper title, it should, in the language of the law, be a *pedis possessio*; an actual occupancy of the premises in question." *Mutual Fire Insurance Co. v. Marseilles Manufacturing Co.*, 1 Gil. 239 and 266. Actual occupancy there evidently means *with the foot on the soil*.

A certificate of the United States land office, is no evidence of such a possession as will enable the party to sustain this action. *Rogan v. Walker*, 1 Wis. 650. We request the court to examine this case, as to what is actual possession to maintain this action. Also *Kincaid v. Logue*, 7 Missouri, 166; *Moore v. Sloane*, 7 Mo. 170. In *Kincaid v. Logue*, the plaintiff had bought an improvement, built a cabin in which he lived, built the worm of a fence around the place, in some places three or four rails high, and in others one or two rails high, with the declared intent of making a pasture and keeping off intruders. The defendant entered the inclosure and built a cabin near to that of Kincaid. Held, that Kincaid

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had no such possession as would enable him to maintain forcible entry and detainer.

In *McMechon v. Griffing*, 3 Pick. 149, the evidence of possession was the repairing of a fence, the driving cattle to pasture, taking down and removing an old hovel, which covered a saw for sawing wood, taking all his winter's wood from the lot, and principally from the part in dispute, selling five trees from the lot, three of them on the part in dispute, and which were cut and carried away. The part in dispute was Timothy Griffing's share in the division of his father's estate, and was part of what was called the Tracy lot, the other part of the lot being the share of another person, who bought Timothy's share from him, but did not record the deed, and who claimed to be in possession of the whole lot, and by such possession to protect his title against a subsequent purchaser from Timothy. On page 156, the court says: "There is no evidence to show that the tenant, at the time of the attachment, or at any time previous, had the open visible possession, and improvement of the premises."

Blood v. Wood, 1 Metcalf, 528. An execution was levied on land not the judgment debtor's, being part of a large uninclosed meadow; and the judgment creditor entered thereon two or three times for the purpose of showing the grass for sale, but took no actual possession. He afterwards advertised a sale of the grass in a public newspaper, as grass growing on his land, and caused the same to be sold at auction, at a distance from the land, and the purchaser thereof cut and carried it away, the true owner of the land having no actual notice of the proceeding. Held, that these acts did not constitute such a disseizin of the true owner as to prevent his maintaining an action of trespass against the purchaser of the grass. In *Barr v. Gratz's heirs*, 4 U. S. Cond. 426, 427: "There being no evidence that Colburn was the legal owner of Benjamin Netherland's survey, it was held that his entry must be construed as an entry without title, and consequently his disseizin must be limited to the bounds of his actual occupancy." In *Obburn v. Hollie*, 8 Metc. 125, it is decided, "that the making of a fence on wild land, by felling

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trees and lapping them together, is not sufficient to warrant a jury in presuming that the owner of land had notice of such fence, nor does it amount to a disseizin of the owner." The court affirm the case of *Bates v. Norcross*, 14 Pick. 224, in which case, it is held, that "a deed of wild land, executed and acknowledged by a grantor, who had no right to the land, and duly recorded in the registry of deeds, and a mere entry by the grantee, without an *open exclusive* occupation manifested by fencing or otherwise, do not amount to a disseizin against the will of the true owner."

In 2 White & Tudor's Leading Cases, 119, in speaking of constructive notice of title arising from possession, the annotators say: "It is also well settled that the possession must be actual, and must be of such a nature as would suffice to constitute a disseizin or adverse possession. *Harrick v. Powell*, 9 Alabama, 409." And in *Holmes v. Stout*, 3 Green's Ch. 492, it was decided, that cutting timber, from time to time, in woodland at a distance from the dwelling of the party who cut it, was not such a possession as would give constructive notice of an unrecorded title. If it was not such possession as to give notice, it certainly was not *actual possession*. See *Packwood v. Thorp*, 8 Missouri, 638; and Addison, (Pennsylvania,) 316. The latter is a strong case in point.

The case of *Bell v. Longworth*, 6 Indiana, 274, has been cited as an authority against us. But a careful examination of it, will show that it is not against our view of the case, but rather in support of it. Forcible entry and detainer, in Indiana, is as follows: "Every person who shall violently take or keep possession of any lands, with menaces, force, and arms, without authority of law, shall be deemed guilty of forcible entry or forcible detainer, as the case may be." 2 Revised Stat. of Indiana, 430, § 12. It will be noticed that *possession* is the word used in that statute, whereas, *prior actual possession* are the words used in ours; the words *prior actual* must mean something, otherwise the legislature of our state would not use them: and so the decisions of Indiana courts, would not be strictly in point here. Besides the case of *Bell v. Longworth*, shows that title papers were introduced,

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which shows that the action is not the same in this and in that state. Longworth showed his title papers, which had reference to the entire quarter section in dispute, and it further appeared that in 1822, he "appointed an agent to take charge of his purchase, and has since continued the agency uninterrupted; that the agent has resided near or upon the land, which is situate adjoining Evansville, in that state; that, in the language of one of the witnesses, the whole quarter section was included in his agency; he cut timber over it, prevented others from cutting, warned people off of it, and employed other persons to watch trespassers and keep them off. He paid the taxes upon the quarter, *leased portions of it to different individuals*, by whom some clearing and fencing were done; but the whole tract was never inclosed; though the oldest inhabitants in the vicinity say, it had always been known amongst them as Longworth's quarter." And again, further down on the page, 275: "As to the entry upon and detainer of the land by Bell and Kiger, [the defendants,] there was evidence tending to prove that they knew it belonged to, or was claimed by Longworth; that it was in charge of his agent, and *patches of it in possession of his tenants*; and that with this knowledge, in January, 1852, *they entered upon a portion of the cultivated part of the section, commenced fencing it,*" &c., &c.

We call the attention of the court here, to the fact that there was evidence of *cultivation* and possession by *residence*, in that case; such possession as we say is *actual possession*, and consequently that the case cannot be against us. On page 277, the court says: "A man cannot go, solitary and alone, to the prairies or forests of the west, set himself down in the middle thereof, and claim that he possesses all, to an undefined extent, not then actually possessed by some one else. He must be limited to that portion over which he exercises *palpable* and *continuous* acts of ownership, as being the quantity which he claims as his own—there being no other evidence, in such case, to enable us to determine the quantity." The court say, "*palpable and continuous* acts of own-

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ership;" just such acts as we contend are meant by *actual possession*.

Another case is cited as being against us, namely, *Campbell v. Thomas*, 9 B. Monroe, 83. That is an action of ejectment. *Possession* is spoken of, and not actual possession. Besides, it will be seen that the party *entered and settled* on his survey, and his possession was held to extend to the boundaries of his survey.

Still another case is quoted, namely, *Roberts' heirs v. Long*, 12 Ben. Monroe, 195. This is an action of forcible entry and detainer; but a careful examination of the case, will show that it is in favor of defendants, in the present case, and not against them. (See page 197, to end of case.) The defendant was successful in the court below, and in the court above too, and because that the plaintiff's possession being under a junior patent, could not be held to extend to any more than what did not interfere with the older patent. The appellants (that is the plaintiffs) did not show any right to enter upon the part covered by the older patent; their "acts were *unauthorized and illegal*, and not constituting in themselves an actual possession, will not by operation of law have the effect of extending the actual possession of the appellants." And it should be further noticed that the plaintiffs were *actually settled* on their claim, but that their settlement was not held to extend to that part of it on which the alleged forcible entry was made.

Swan's Treatise, 465, and the 14th of Wend. 239, are the only other authorities cited against us, which we have had the opportunity of examining. We contend that they are not in point, because they refer to the action of trespass. The possession necessary to sustain trespass, is different from that necessary to sustain forcible entry and detainer. I may maintain trespass for an injury to land in the possession of my tenant, and declare on it as my possession. I cannot do so in forcible entry and detainer. The proceedings are not analogous; the words *prior actual possession* must mean something more than such a possession as is sufficient to maintain trespass; it must mean a possession from day to day, a con-

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tinuous and palpable possession; such a one as when it is forcibly or stealthily interfered with, requires a summary remedy—a remedy to be exercised on two days' notice, without waiting for a calm and careful trial in the District Court, in the ordinary way.

Wiltse & Blachley, for the appellee.

We have examined the argument of defendants' counsel, upon the present hearing, and have turned to the authorities cited, without finding anything not adduced by them both in the District Court, and upon the first hearing in this court. The cases of *Kincaid v. Logue*, 7 Mo. 166; *Sloan v. Moore*, 7 Mo. 170; and *Packwood v. Thorp*, 8 Mo. 636, all turn upon the want of title in, and the fraud of, the respective plaintiffs. In these, as in many cases to be met with, whether from terms of the statute, or otherwise, the question of title has been the controlling one, and where a party has been found in possession, without colorable or *bona fide* title, and especially where the possession has been in fraud of such title, it has found no favor with or mercy from the court.

The case of *McMeehan v. Griffing*, 3 Pickering, 149, decides that certain acts of possession did not amount to notice of an unregistered deed. In *Coburn v. Hollis*, 3 Metcalf, 125, it was decided that a brush fence felled upon another's land, in the woods, some forty years before, and of which the owner of the land had no actual notice, did not amount to a disseizin that would enable the intruder to hold the land under the statute of limitations. The case in 14 Pickering, goes to the extent that a bare entry under a deed from a grantor who had no title, does not amount to disseizin. The case of *Hancock & Powell v. Thompson*, 9 Alabama, 409, discusses the kind of notice of an outstanding, equitable title, that will not defeat a legal title.

The "strong case," in Addison's (Pa.) Reports, (*The State v. Lemmon*, 315,) is the only one defendants have produced, the terms of which squint towards their definition of actual possession. But aside from the great change that has in sixty years taken place in the nature of the action of, and the

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scope and policy of the law governing forcible entry and detainer, two facts conspire to strip this case of authority: 1st. It gives no clue to the law upon which it was based, and was manifestly pronounced without consideration; and 2d. It was a criminal proceeding.

The disquisition in *Leading Cases in Equity*, by White and Tudor, will be precisely in point, when a *bona fide* purchaser for value, seeks the shield of equity against a defect in title, of which he has no notice.

That the "actual possession," of our Code, is as claimed by defendants, a being upon, and all the time upon, the land, is not helped any by the case of *Gates v. Winslow*, 1 Wis. 650. The case does not contain a word upon the subject. The 1st of Gilman, (*Illinois Mutual Fire Insurance Co. v. Marseilles Manufacturing Company*), is cited to prove that actual possession is a *pedis possessio*. The title papers of the company were defective, and it fell back upon its possessory title, in order to make out an insurable interest. The question was, whether the possession amounted to title?

These are the authorities relied upon, to show that this court "overlooked" the meaning of actual possession.

The notion that the possession requisite to maintain this action, must be a continuous bodily occupancy, is wholly new, is advanced by no law writer, and would render the act concerning forcible entry and detainer a dead letter; for against such an occupancy, it would be rare indeed, that a forcible entry would or could be made. A vacant room in a house, could, by the same reasoning, be entered and held, till the slow remedy of trespass or ejectment should come to the relief of the owner.

Actual possession, in regard to real property, is a term widely used in American law, and has the same meaning and application in trespass, that it has in forcible entry and detainer cases. If otherwise, it is passing strange, that the distinction has escaped the observation of courts and publicists. It means any act or fact, which puts the mere intruder, without title, upon inquiry; and this rule has double force, as applied to town or city property. There is no four

acre lot in any city of the size of Dubuque, of which the owner is not in actual possession; nor can there be found in such a city a man, so ill informed as not to know that the usual manner of actually possessing town lots, is by having the boundaries marked out.

The premises in this case, was a lot in the city of Dubuque. Plaintiff not only owned and had entered upon adjoining grounds, but had sold the contiguous grounds in connection with, and as part of said premises. Much more than this; he had entered upon the tract in dispute, cut firewood from it, cleared away the brush, surveyed the boundaries, and subdivided it into lots, set up monuments at the corners, blazed the trees upon the lines, graded a street to, and for several feet upon the premises, all which were plainly to be seen, and were seen by defendants. Their access in fact to the lot, was by plaintiff's road, and it was over this road that defendants stealthily and hurriedly hauled up the materials for their pine fence. The manner of defendants' entry, demonstrates the fact that they had full and complete notice, and that their entry was forcible, stealthy, and fraudulent. A gang of eight or nine men; their hurry; the part of their fence out of sight of the city, and in the brush, built first; their surveyor urged to speed, and enjoined to secrecy; and their gang of ruffians employed to defend this fraudulent possession with their lives! Upon the first appearance of the fence on the side of the lot in view of the town, the plaintiff asserts his possession, and in attempting to enter upon his land, is stopped by a gang stationed for this purpose. Who was this ambuscade to keep out, but the man who had left upon the ground abundant and unmistakable evidences of actual possession? Is any other finding by a jury than "guilty," conceivable, under this state of facts? especially when instructed in the law of the case as stated in 1 Cowen's Treatise, 414; 4 Conn. 79; 12 Johns. 452; 21 Conn. 500; 14 Wend. 239; 3 Monroe, 261; 3 Littell, 298 and 394; 6 Ind. 274; 12 Grat-
tan, 470?

But defendants would have it that plaintiff was a trespasser upon this lot, because they had once mined there. The only

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evidence that defendants ever had anything to do with this lot, prior to that entry for which this suit was brought, is the deposition of one Michael Riley, taken in support of the fishing bill, brought in 1854, by defendants against plaintiff, and which deposition, strangely enough, forms a part of the record in this case. By this deposition, it seems that the commissioners who laid out Dubuque, under the acts of Congress of 2d of July, 1836, and 3d of March, 1837, adjudicated upon defendants' claim to this lot, and decided against them. Said commissioners formed a court for this very purpose, from the decisions of which there was no appeal. Witness, in 1845, mined under a lease from the city of Dubuque, (see his cross-examination.) He says, that they did not know that the lot had not been given to them, till the map came out, five years after their testimony was given to the commissioners, and then says, that the commissioners sat in 1837 or 1838, and that the map came out just before the sale of the lots in 1838 or 1839.

Defendants, in their brief, admit that plaintiff entered under a deed from said city.

Upon this hearing, it is upon defendants to show that this court has erred, and no approach to such a showing do they make.

Burt & Barker, for the appellee, also filed a written argument, in which they cited the following authorities: *Olinger v. Shepperd*, 12 Grat. 470; *Cates v. Loftus' heirs*, 4 B. Monroe, 442; *Boyce v. Blake et al.*, 2 Dana, 127; *Roberts v. Long*, 12 B. Monroe, 195; 4 Kent Com. 124.

STOCKTON, J.—In answer to the petition for a rehearing in this case, and to the additional argument furnished by defendants' counsel, we deem it proper to state more fully and explicitly, our views of the law in actions of forcible entry and detainer, in its relation to this case, and particularly as to what is meant by the words "actual possession," in the statute.

It is claimed by defendants' counsel, that the words used

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in the Code, (section 2362,) have two meanings: *First*. When it is applied to a possession distinct from constructive possession, where there is no actual occupancy; or to the possession which one may have by his agent, steward, or tenant; *Second*. Where it is applied to a party who has possession continued from day to day; in other words, actual bodily occupancy. It is claimed, that the summary remedy of forcible entry and detainer, is given only to the person who may have such actual possession as is last mentioned, where the forcible ejection demands a more speedy remedy than is furnished by the actions of ejectment or trespass—that it is only a real actual possession that is protected by the act, and not a possession construed to continue, because of certain acts done months before. We think the distinction attempted to be drawn is not a very clear one, and if it were justified by the authorities, we do not think the conclusion sought to be drawn from it, is legitimate. The remedy is given by the statute in one contingency only, viz: “where the defendant has by force, or intimidation, or fraud, or stealth, entered upon the prior actual possession of another, and detains the same.” To construe this language as affording a remedy for those cases only, where the party is ousted from premises of which he is in the actual bodily possession from day to day, would be to restrain the plain meaning of language, in order to deny that speedy and effectual redress given by the statute of forcible entry and detainer, for a class of wrongs which quite as loudly call for such remedy as those which are claimed by defendants’ counsel, as being specially favored and provided for by the statute.

The distinction claimed to exist, is illustrated by the possession which a man holds by his tenant, agent, or steward; this, it is said, is by the law construed to be his *actual* possession. Now the possession of lands by the tenant, agent, or steward, is the possession of the person, under or for whom he holds; and it never was denied that a man might acquire or hold the actual possession by another as well as by himself; for what a man does by another, he does by himself. *Speed v. Buford*, 3 Bibb, 75. We cannot better illus-

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trate the whole subject, than by quoting and adopting as our own, the language of BOYLE, C. J., in the above entitled cause: "There are but two kinds of seizin or possession known to the law; a seizin or possession in fact, and a seizin or possession in law. The former is gained by an actual entry upon the land; the latter is where there is no such actual entry made, but the law for certain purposes, supposes a fictitious possession. The one is, therefore, founded upon fact, and the other upon fiction. The one is real and cognizable by the senses; the other is ideal, and exists only in contemplation and construction of law. Besides these, the law not only recognizes no other, but it is impossible that any other should exist. The mind cannot conceive the idea of a third species of possession; nor can any combination of words express such an idea. To say that a person may be seized in deed or in fact, by construction of law, is an assertion which conveys no distinct meaning; it is, in truth, inconsistent with itself. For if a person be seized in deed or in fact, then he is not seized by construction; and if he be seized by construction only, he is not seized in deed; where the fact exists, the fiction must be at an end; and if the fact do not exist, the possession can be nothing but a fiction." *Speed v. Buford*, 3 Bibb, 74.

The defendants can derive no advantage, nor do we think their rights at all strengthened in this action, from the fact that some of them had previously claimed or possessed the premises in dispute. The testimony showed that in the year 1836, and for some years subsequent thereto, they were occupied by them as mining ground. It is pretty clear, however, that their claim had been abandoned, and that for more than ten years before the commencement of this suit, and until the acts of Langworthy, no one had actual possession of the premises, and there was no improvement on them. It had been set apart by the commissioners who laid off the town of Dubuque under the act of Congress, as a grave yard for the use of the public, and was marked and designated as such on the official map of the town returned by them. They refused to grant a certificate of pre-emption to any of the

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claimants of the premises. At the time of the acts of Langworthy, in the spring of 1854, no one appears to have been in possession. His acts were unquestioned, and for all the purposes of this cause, must be taken to have been done with lawful authority. We do not understand the defendants' counsel to contend, that the jury were not authorized to infer from them that Langworthy had actual possession, according to one of their definitions of the term.

They oppose to these acts, however, the previous possession of the defendants, or some of them, ten years before; from which they would have the court infer that the entry of Langworthy was unauthorized and tortious; and the further fact that Langworthy's last act of possession was shown to have been in June, and that the taking possession by defendants was in October. They claim that Langworthy's possession did not extend beyond the time he was actually on the land, and that defendants, at the time of their entry, finding no person actually on the premises, had good right to take possession.

The ready and conclusive reply to this is, that the jury were the judges, under the instructions of the court, of whether the plaintiff had the actual possession of the premises by the acts done in June, and whether such possession continued until October, the time of defendants' entry. It is the intention with which the acts are done, that gives them their character. If done with no intention of acquiring possession, they did not give the plaintiff possession. And by the same acts from which the jury inferred that Langworthy had, and obtained actual possession, they were authorized to infer that such actual possession continued to the time of the alleged unlawful and forcible entry by defendants. It is not claimed that there was any evidence of abandonment of the possession by plaintiff, or of any intention of such abandonment, unless it is to be inferred from the fact that the premises were not inclosed or built upon, and that plaintiff did not, from day to day, have the actual occupancy thereof, *with his foot upon the soil*.

In reference to that feature of their case, in which it is

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claimed for defendants, that their rights to the premises in dispute are of long standing and originated many years prior to any claim plaintiff may have, we refer them to the language of the Court of Appeals of Virginia, in the case of *Olinger v. Shepperd*, 12 Grattan, 470, in which they say: "The remedy for a forcible entry was designed to protect ~~the~~ *the actual possession*, whether rightful or wrongful, against unlawful invasion, and to afford a summary redress and restitution. The plaintiff is not suing for damages, but to have the possession restored to him. The judgment has only the effect of placing the parties in *statu quo*. It settles nothing between them in regard to the title or right of possession." And again, "what is the nature of the possession to which this summary proceeding applies? It is certainly not confined to possession by actual occupancy or inclosure. It applies to any possession which is sufficient to sustain an action of trespass. Title draws after it the possession of property, not in the adverse possession of another. Actual possession of a tract of land, under *bona fide* claim and color of title to the whole, is possession of the whole, or so much thereof as is not in the adverse possession of others. This is the general principle, and it applies to the remedy in question."

To the argument and authorities furnished to us by defendants' counsel, we have given that careful and deliberate consideration which the importance of the questions involved seemed to demand; but we have not been able to find in them anything subversive of these propositions: *First*. There may be possession in fact of unimproved or uninclosed land; and it is not essential to such actual possession, that the premises should be surrounded by a fence, or built upon. *Second*. An entry upon land with the intention of clearing it and fitting it for cultivation, or of exercising over it such acts of ownership as are usually exercised by owners over land on which they do not reside, is such an entry as that a jury may infer from it actual possession. *Third*. One who enters upon land, no part of which is held adversely at the time of the entry, intending to take possession of the whole tract, is in possession to the extent of his claim. In support of these

positions, in addition to the authorities already cited, we may refer to the following: *Cates v. Loftus' heirs*, 4 Monroe, 442; *Boyce v. Blake & Co.*, 2 Dana, 127; 4 Conn. 79; 21 Ib. 500; 12 Johnson, 452. We conclude, therefore, that there was no error in the ruling of the District Court, refusing a new trial, on the ground that there was no sufficient evidence of actual possession by the plaintiff, to authorize the jury in finding the verdict.

On the other branch of the question, involving the giving of certain instructions asked by the plaintiff, and the failure of the court to read to the jury the written instructions asked by defendants, and the conduct of the jury before and after retiring to consider of their verdict, we find no sufficient reasons to induce us to alter our opinion heretofore expressed. The instructions asked by plaintiff and given by the court, were not excepted to by defendant. No objection was made to the handing of the written instructions to the jury, without having them first read; no effort was made to obtain the action of the court to correct the alleged improper conduct of the jury before their retirement; nor is there anything from which it can be inferred that the jury, in making up their verdict, misunderstood or misinterpreted the charge of the court.

A large discretion is allowed the District Court in granting or refusing new trials. We would not interfere with this discretion, or reverse the action of the District Court, upon light grounds or trivial reasons. We must be clearly satisfied that the party's rights have been so prejudiced, and that such injustice has been done him by refusing him a new trial, as to call unmistakably for the interposition of this court. In the present case, the District Court was cognizant of the facts on which the application for a new trial was based. A portion of them occurred in its presence. As it has not seen proper to interfere with the verdict, neither upon the facts which were of its own knowledge, nor upon those brought to its notice by the affidavit of the juror, unless the error and injustice of its action are made palpably manifest to us, we will not reverse its judgment.

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We can only judge of the weight which the District Court attaches to the reasons urged for a new trial, and of its opinion of their validity, by the decision which it renders upon them in this case. The record shows that the court was of opinion that there ought not to have been a new trial for the reasons urged. It cannot be expected that this court will turn aside from the record, and look elsewhere, to ascertain whether the court entertained a different opinion. It is hardly permissible in the party to file affidavits in this court, to show that the District Court thought one way, and decided another. We must abide by the record as it is. The judgment of affirmance will stand as originally entered.

Judgment affirmed.

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In an action between the creditors of the vendor and the vendee, to defeat a sale of property alleged to have been made with intent to defraud creditors, the vendor is a competent witness for the creditors, to prove facts tending to establish the alleged fraud.

The vendor being a competent witness for the creditors, in such a case, to prove facts tending to show a fraudulent sale of the property, his widow is also a competent witness to prove similar facts.

Where in an action of trespass by the vendee, against a sheriff and certain creditors of the vendor, for seizing and carrying away certain personal property, the defendants justified under certain writs of attachment and executions, and alleged that the sale to the plaintiff, was made with intent to defraud the creditors of the vendor, which was denied by the replication; and where the defendants on the trial, offered the widow of the vendor as a witness, to prove circumstances tending to show that the sale to the plaintiff was fraudulent, and made with intent to hinder and delay the creditors of her late husband, to which witness the plaintiff objected, that she was incompetent, on the ground of interest, which objection was sustained, and the witness not allowed to testify; *Held*, That the witness was competent, and that the court erred in sustaining the objection.

A cause will not be reversed on account of an erroneous instruction, which could work no prejudice to the party complaining.

Where in an action of trespass to personal property, by the vendee against the sheriff and creditors of the vendor, it appeared from the evidence, that at the

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time of the alleged sale to the plaintiff, the goods were in Illinois; that they were afterwards removed to Sabula, Iowa, and deposited in the name of the vendor, with certain warehousemen, who executed to the vendor the usual warehouse receipts; that in part payment for the goods, the vendee drew on one A. of New York, for four thousand dollars; that it was agreed between the vendor and vendee, that the goods should be deposited in these warehouses, in the name of the vendor, until said draft was duly accepted; that after the sale, the vendor and vendee went to Chicago, and there deposited the warehouse receipts, with R. and S., indorsed in blank by the vendor, with the agreement that they were to be delivered to the plaintiff, or held by R. and S. for his use, whenever they were advised of the acceptance of the draft by A.; that the vendor was owing R. and S., and upon the acceptance of said draft, they were to credit him with the amount; and that the draft was accepted, and notice given thereof to R. and S., or that R. and S. gave the vendor credit for the amount of the draft, prior to the levy of the attachments under which the defendants justified; and where the court instructed the jury as follows: That where goods are left with a warehouseman, who gives his receipt for the same, the sale of the goods, and assignment of the warehouse receipts, and delivery of them to the purchaser, is a delivery of the goods;" *Held*, That the instruction was correct.

Where in an action of trespass to personal property, by the vendee, against a sheriff and certain creditors of the vendor, the defendants, for the purpose of defeating the sale under which the plaintiff claimed, asked A., a witness called by them, the following question: "While B. M. (under whom the plaintiff claimed,) and W. were in possession of the goods, and on or about the first of January, 1854, did they or not, agree to send the goods over the river to Sabula, in Iowa, to be out of the way of their creditors, or the creditors of B.?" to which interrogatory, the plaintiff objected, and the court sustained the objection; and where it did not appear from the record, that the question was objected to in the court below, on the ground that it was leading in its character, though that objection was urged in the appellate court; *Held*, 1. That the court erred in sustaining the objection to the interrogatory; 2. That the objection that it was leading, was not valid, unless made at the time the question was propounded.

Appeal from the Jackson District Court.

ON the 17th of January, 1854, the defendant Foley, as sheriff of Jackson county, attached certain goods, wares, and merchandise, by virtue of several writs of attachment, in favor of his co-defendants, and against one Bøyd. Judgments were afterwards rendered in favor of the attaching creditors, and the property so attached, sold under execution to satisfy said debts. The plaintiff thereupon brought his action of trespass against the sheriff and the said creditors, for the

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value of the goods, claiming that at the time of the levy of said attachments, they belonged to him, as the vendee of one Marsh. The defendants all answer, admitting the sale under the executions, and denying that said goods were the property of plaintiff, but averring that they belonged to said Boyd. During the trial, certain testimony was rejected, and instructions given, as will sufficiently appear from the opinion of the court, to which defendants excepted. Verdict for plaintiff in the sum of seven thousand eight hundred and eighty-three 83-100 dollars. Motion for a new trial overruled. Judgment on the verdict, and defendants appeal.

J. B. Booth, and *Clark & Bissell*, for the appellants, contended :

1. The court erred in rejecting the testimony of Mrs. Boyd. She had no such interest in the question as to render her incompetent. *Stewart v. Kip*, 5 Johns. 256; *Fulls & Smith v. Belknap*, 1 Ib. 490; *Baker v. Arnold*, 1 Caines, 274; *Walton v. Shelley*, 1 Term, 300; 3 Kinney, 148; *Carter v. Pearce*, 1 Term, 163; *McLeod v. Johnson*, 4 Johns. 126; 18 Pick. 108; 6 Eng. Com. Law, 467; *Cutter v. Copeland*, 18 Maine, 127; *Sawyer v. Felton*, 1 Rawle, 141; *Jommer v. Sommer*, 1 Watts, 303; 8 Wend. 490; 1 Phil. Ev. 84, 119; 3 Ib. 77. A mere interest does not disqualify. There is a manifest distinction between a mere and a direct interest. 3 Phil. Ev. (3d ed.) 36, note 32; 3 Johns. Cases, 83. She came to support no right of her own. 3 Phil. Ev. 38, 40, 42; 2 Starkie on Evidence, 401, note 1; 1 Greenleaf's Evidence, (6th ed.) §§ 341, 390. Her interest, if any, was a balanced interest. Greenl. Ev. 420; 2 Phil. Ev. 126, note 117. The interest must be in the result of the cause. 1 Greenleaf's Evidence, § 386.

2. The court erred in overruling the question to Atherton. If answered affirmatively, it contradicted Marsh, and defendants had a right to prove the acts and declarations of Boyd and Marsh, while in possession of the goods, as evidence of fraud. *Jackson v. Mather*, 7 Cowen, 301.

3. The court erred in giving the jury the first and second

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instructions. The second is in conflict with the decision of this court, in the case of *Merchants and Mechanics' Bank of Chicago v. Hewitt*, 3 Iowa, 98, and was calculated to mislead the jury. Code, § 1193; 3 McLean, 551; 18 Mis. 281; 6 Barbour S. C., 79; 2 Kent's Com. (8th ed.) 676; *Welsh v. Hayden*, 1 Pennsylvania, 57; *Sturtevant v. Ballard*, 9 Johns. 338; 4 Scam. 296.

· *Wm. E. Leffingwell*, and *Smith, McKinlay & Poor*, for the appellee.

The principal error assigned by the appellants, is the rejection of Mrs. Sarah Boyd, (the widow of Thomas A. B. Boyd,) as a witness. In order to ascertain whether she was a competent witness, it is necessary that the true position of Boyd, her husband, and of herself, in relation to the case, be understood. The history of this case is simply this: Boyd was largely indebted to the appellants, who commenced suit by attachment, on the 17th day of January, 1854, and levied upon the goods in controversy. Boyd had been engaged in the mercantile business, and Boyd, Marsh and Wright, had been engaged in the produce business. The firm of Boyd, Marsh & Wright, were large indebted to the firm of Ring & Smith, of Chicago, for cash advances, to enable them to purchase produce. Ring & Smith, being dissatisfied with the firm, but friendly to Marsh, agreed with Marsh, upon his becoming responsible to them to pay their claims at a given day, to give Marsh an extension of time, and to look to him individually for their claims. In order to meet this demand, Boyd sold the goods to Marsh, and Marsh, on the 20th of December, 1853, finding a purchaser in Adams, (the plaintiff,) sold the goods to him at ten per cent. less than New York cost, amounting to about seven thousand dollars, of which sum four thousand dollars was paid by a draft, drawn by plaintiff on H. P. Adams, in New York, with the understanding that the goods should be invoiced, boxed and stored in Sabula, and that the draft and warehouse receipt, should be deposited with Ring & Smith, in Chicago, and upon the acceptance of the draft by H. P. Adams, the warehouse re-

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ceipts should be held by Ring & Smith, for the plaintiff, and the sale should be consummated. Upon the 4th day of January, 1854, the draft was accepted and paid, and the amount of \$4,000 placed to the credit of Marsh, by Ring & Smith; the warehouse receipts were all then delivered to Ring & Smith, for Adams, the last being delivered on the 10th of January, 1854, seven days before the attachments were levied; and the balance of the purchase money for the goods, was paid by Adams to Marsh, in the month of March following. The goods were taken upon attachments against Boyd, on the 17th of January, 1854, and were afterwards sold upon judgments against him. This action, then, is brought against the sheriff and Boyd's judgment creditors, to recover the value of the goods. Mrs. Boyd, who is introduced for the purpose of proving upon her husband, a fraud, is rejected as incompetent, and we think properly, for various reasons.

The wife will not be permitted to impeach, or in any way criminate the husband, except it be for injuries to her person. Section 2391 Code; Peake's Evidence, 174, marginal; *Com. v. Eastland*, 1 Mass. 15; *Beveridge v. Winter*, 1 Car. & P. 364; *Teddy v. Wellesby*, 3 Ib. 558; *Campbell v. Twemlow*, 1 Price, 81; *Batthews v. Galindo*, 4 Bingham, 610. If Boyd himself was incompetent, so is his wife. 1 Greenleaf's Evidence, § 341; *Griffen v. Brown*, 2 Pick. 30; *Fitch v. Hill*, 11 Mass. 286. In all cases where the husband or wife are interested in the event of the proceedings, the principle of the rule for the exclusion of their testimony, is carried to its fullest extent, 1 Phillipps' Evidence, 70; *Davis v. Dinwoodie*, 4 T. R. 678. And the objection to their competency, is not removed by a dissolution of the marriage relation. 1 Phillipps' Evidence, 75; *Averson v. Kinnard*, 6 East, 192; *Docker v. Hasler*, 1 Ry. & Mo. 198; *Ewes v. Hunter*, 4 Gillman, 21; *Stein v. Boorman*, 13 Peters, 209. Boyd himself would have been incompetent, for by testifying, his interest would cause him to establish the title to the goods in himself, and thereby discharge the appellants' claims against him. See 3 Cow. & Hill's Notes, 225. The case of *Bland v. Ans-*

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ley, 2 New Rep. 331, is precisely in point. In that case, the question was, whether the sheriff had lawfully seized the goods of A., under an execution against B., and B. was held to be an incompetent witness to disprove A.'s title to the goods; for, said the court: "The effect of his testimony, would be to pay his own debt with the goods which had been seized." See also, *Nathan v. Buckland*, 2 B. Mon. 153; *Favor v. Marlett*, 1 Gillman, 385. Boyd would also have been incompetent to prove that the transaction between himself and Marsh, was a fraud.

Mrs. Boyd was also incompetent, upon the ground of interest. She was directly interested in the result of the suit. By disproving the plaintiff's title to the goods, and establishing title in her husband, she would by her testimony, appropriate the goods to the discharge of her husband's debts, to that amount, and thereby receive her additional distributive share of his estate, to that amount. It is, however, contended, that she was competent, for the reason that her interest was *balanced*. The interest of the proposed witnesses in *Bland v. Ansley*, and in *Favor v. Marlett*, were as nicely balanced as in this case, yet the court held them to be incompetent. In this case, the interest of the witness is attempted to be balanced in a peculiar manner. It is said that Boyd was liable to Adams upon an implied warranty of title, and that Boyd's wife is competent to show the sale to be fraudulent. Therefore, her interest is a balanced interest. If the sale was fraudulent, as is contended, could Adams, in a court of law or equity, claim anything of Boyd, his confederate in the fraud? Most assuredly not; the fraud vitiates everything. Then the design and tendency of Mrs. Boyd's testimony, would be simply this, to establish the title of the goods in her husband, and thereby discharge \$7,000 of his debts; and at the same time, protect his estate from a recourse by Adams on his executors, for the money paid by him for the goods, by reason of her husband's and Adams' fraud. The interest of the witness is clearly in favor of the party calling her, and in no other, and she is incompetent for them.

The exception taken by the appellants, in relation to the
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charge of the court, "that the delivery of the warehouse receipts, was a delivery of the goods," is untenable. See *Shindler v. Houston*, 1 Conn. 261; 2 Kent Com. 499, 503.

The payment of the \$4,000 draft, takes the case out of the statute of frauds, and upon this proof, and the delivery of the warehouse receipts, Adams can hold the goods against the world. *Morton v. Thibbits*, 15 Ad. & El. (N. S.) 428.

WRIGHT, C. J.—It is first claimed, that the court erred in excluding the testimony of Mrs. Boyd, the widow of the attachment defendant, when offered by the appellants. To fully understand the question here presented, a brief reference to the testimony and position of the parties, becomes necessary. The defendants insist that the sale from Marsh to plaintiff, was not, at the time of the attachment of the goods, so complete, as against them, as to pass the title; but that if it was, it was fraudulent and made to hinder and delay the creditors of said Boyd. It seems that Boyd, Marsh and Wright, had been in partnership as merchants; and the plaintiff claims, that prior to the sale to him, Marsh had purchased the interest of the other parties in said goods. On the other hand, defendants insist that there was no sale to Marsh, or if any, that it was fraudulent, and that in truth and in fact, there was a combination between plaintiff, Boyd and Marsh, to defraud the creditors of Boyd; and that the sale to plaintiff was made with that object and purpose. After the attachments were levied, and before the trial of this case, Boyd died, and as shown by the bill of exceptions, his widow was offered as a witness, by defendants. It was not sought to elicit from her, any conversation between her and her late husband, or any communication he may have made to her on the subject of said sale, but to prove circumstances within her knowledge, which might tend to show, that the sale to plaintiff was fraudulent, and made to hinder and delay the creditors of her late husband, as also the creditors of the firm. Being objected to by plaintiff, *on the ground of interest*, the witness was not allowed to testify to these matters, and defendants excepted.

Was the witness competent? Whether Boyd, if living,

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would be a competent witness, is a question upon which the authorities are by no means agreed. It is believed, that it has never been determined in this state. Treating it as a new question, therefore, in this court, which rule shall we adopt? We answer, that while we have some hesitation, yet upon the whole, we incline to the opinion that he would be competent, and shall so hold. His interest, we regard as a balanced one—his liability equal, whatever the result of the suit. This is the ground taken by those authorities which hold the vendor to be a competent witness for an execution plaintiff; and it recommends itself to us, as being quite as just and reasonable as the contrary rule. And aside from the influence of adjudicated cases, two considerations have had weight with us, in arriving at this conclusion. The first is, the rule recognized in *Cutter v. Fanning*, 2 Iowa, 580, that courts will let in truth, whenever precedent will admit it, by holding objections to apply to the credit, rather than the competency of a witness. To give this rule a liberal instead of a restricted operation, is the tendency of all the more recent legislation and decisions in the several states. In the second place, while it is said in trials of this character, involving questions of fraud, that the interest of the vendor is with the creditor, and against the claimant, the experience of every lawyer will sustain the assertion, that in nine cases out of ten, the feelings—the strongest bias, if not the interest—of the witness, is with the vendee or claimant, and his whole effort is to defeat his creditor. We, therefore, conclude that Boyd, if living, would be a competent witness; and as a consequence, that his wife should have been admitted when offered by the defendants. It is not improbable that she would be competent, though he might have been incompetent. But without determining this, it is sufficient to say, that if he would be competent, *she* would most certainly be.

The counsel for appellee insist, that the testimony was properly excluded for other reasons. Without referring to them, however, it is sufficient to say, that the only objection made and determined in the court below, was *that the witness*

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was interested, and beyond this, in strictness, we should not go. The better practice, we think, is for this court, in the adjudication of causes, to confine itself to the disposition of those questions which were heard and determined in the court below. Cases may arise where a departure from this rule, will become necessary. This, in our opinion, is not one of them, and as to such other objections, therefore, we intimate no opinion.

The next assignment of error relates to certain instructions, given as asked by the plaintiff. It seems that the goods at the time of the alleged sale, were in Savannah, Illinois, but were afterwards removed to Sabula, Iowa, and deposited in the name of Marsh, with certain warehousemen. For the goods thus deposited, the usual warehouse receipts were taken, the first bearing date January 3d, and the last January 9th, 1854. In part payment for the goods, as the testimony tends to show, plaintiff drew on one H. P. Adams, of New York, for four thousand dollars; and it was agreed, that the goods were to be deposited in these warehouses, in the name of Marsh, until said draft was duly accepted. Marsh and the plaintiff, after the sale, went to Chicago, and there deposited the warehouse receipts with Ring & Smith, indorsed in blank by Marsh, with the agreement that they were to be delivered to plaintiff, or held by them for his use, whenever they were advised of the acceptance of said draft by H. P. Adams, of New York. Marsh was owing Ring & Smith, and upon the acceptance of said draft, they were to credit him with the amount. It is fairly inferable from the testimony, either that this draft was accepted, and notice thereof given to Ring & Smith, prior to the levy, or that they, prior to that time, gave Marsh credit for the amount thereof upon their books. Under this testimony, the court instructed the jury: "*First*. That the assignment of a warehouse receipt in blank, is, in law, presumed to have been made and delivered to the holder of the same, on the day when the original receipt was executed, and this presumption must be rebutted by positive testimony. *Second*. That where goods are left with a warehouseman, who gives his

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receipt for the same, the sale of the goods, and the assignment of the warehouse receipts, and delivery of them to the purchaser, is a delivery of the goods." Inasmuch, as the testimony sufficiently shows when, in fact, the warehouse receipts were assigned, and that such assignments and delivery were prior to the levy of the attachments, it is unnecessary to consider whether the first instruction, as an abstract proposition, is or is not correct. To ascertain the time of the transfer, the jury had sufficient evidence, without resorting to the legal presumption that they were assigned on the day of their date. And should we even conclude, that the instruction was erroneous, the case would not, for that reason, be reversed, for it would be, at most, but an error without prejudice to the party complaining. *Hayden v. Plummer*, 2 Hill, 205; *Atkinson v. Lester*, 1 Scam. 407; *U. S. v. Wright*, 1 McLean, 509; *Rhett v. Poe*, 2 How. 457.

The appellants insist, that the second instruction is in conflict with the ruling of this court, in the case of *The Merchants and Mechanics' Bank of Chicago v. Hewitt*, 3 Iowa, 93. That was a suit by the assignee of a warehouse receipt in his own name, against the maker, to recover the value of certain corn therein named. The defendant plead as a set-off, a claim against the original holder of the receipt, as well as some other defences. The question was, whether such a receipt was negotiable, so as to deprive the maker thereof of any legal or equitable defence, against the assignee, which he would have had, if the suit had been brought by the assignor or original holder. And did the question in this case, arise between the plaintiff or the assignee of these receipts and the warehouseman, that case would be applicable. In that case it was held, that such a receipt might be assigned, so as to authorize the assignee to sue in his own name, but that the assignee took the same, subject to all the equities existing between the maker and assignor, before notice to the maker of the assignment. Here the question, however, is whether the assignment and delivery of the receipts, ~~and the goods therein named~~, is a sufficient delivery of the goods, as against creditors, there being no notice prior to said levy,

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of such assignment, either to the warehousemen or the creditors. Appellants rely upon *Gibson v. Stevens*, 3 McLean, 551. The opinion of Judge McLEAN, in that case, recognizes a different rule from that laid down by the District Court in this. That was taken, however, to the Supreme Court of the United States, and reversed, and this second instruction accords with the unanimous opinion of that tribunal. 8 Howard, 384. See also *Conard v. The Atlantic Insurance Co.*, 1 Peters, 445; 2 Kent, 500; *Wilkes & Fontaine v. Ferris*, 5 Johns. 335; Story on Sales, § 311; *Gardner v. Howland*, 2 Pick. 599.

The third error assigned, relates to the refusal of the court, to allow defendants to propound the following questions to Atherton: "While Boyd, Marsh & Wright, were in possession of the goods, and on or about the 1st of January, 1854, did they or not agree to send the goods in question, over the river to Sabula, in Iowa, to be out of the way of their creditors, or the creditors of Boyd?" The plaintiff insists, that the interrogatory was leading, and for that reason, was correctly held to be improper by the court below. It does not appear, however, that any such objection was made in the court below, and we are unwilling to allow such an objection to be valid, unless it was made at the time the question was asked, and an opportunity given to the party putting the question, to propound it in the proper form. The objection is, at most, but a technical one, and when made, is so easily obviated, that it cannot avail in this court, unless it appears to have been made in the court below. The question is, then, whether the testimony sought to be elicited was proper. For the purpose of proving fraud in the alleged sale by Marsh to plaintiff, the testimony was, of course, improper, unless it was shown that plaintiff had knowledge of such agreement, and of the purpose of the partners in thus sending the goods into Iowa. A fraudulent intention on the part of these partners, or on the part of Marsh, (of whom plaintiff claims to have purchased,) would not make the sale void, unless it was further shown that plaintiff participated in such fraud.

For other purposes, however, we think the testimony was proper. It is evident from all the testimony, that it was claimed on the one hand, that the partnership of Boyd, Marsh & Wright, was dissolved long before the sale to plaintiff, and that at the time of the sale, Marsh owned the entire stock; while on the other hand, it is insisted that Marsh was *not*, at the time, the sole owner. The plaintiff also insists that these goods were sent over the river after he had bought from Marsh, to be deposited in certain warehouses, until the draft was accepted, as heretofore stated. Now, if it could be shown, that after the alleged dissolution of this partnership, and after the alleged sale to plaintiff, the three partners were together, and treated these goods as their own, it would certainly tend to rebut the idea that they had previously dissolved, or that Marsh alone owned, or had a right to sell the goods. So, also, if the goods were sent into this state under this agreement, it would certainly tend to negative the claim that they were forwarded as Marsh's, under the arrangement set up by plaintiff. We, therefore, think this question should have been allowed to be put and answered. How far the answer to it, if in the affirmative, might tend to satisfy the jury that the goods were not the property of the plaintiff, it is not for us to inquire. It is sufficient to say, that if answered in the affirmative, it would tend to show that the partnership still continued, and that the goods were sent over the river, and left with the warehousemen, for a purpose other and different from that relied upon by plaintiff.

Judgment reversed.

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An amendment of a petition, showing the character in which the plaintiff sues, but not changing the plaintiff, is permissible.

After the filing of a plea in abatement, alleging that the plaintiff held the cause of action in a representative capacity, and not in his own right, and after a finding for the defendant on such plea in abatement, and before judgment is rendered on the finding, the plaintiff may amend his petition, so as to show the representative capacity in which he sues, upon such terms as the court may impose.

The allegations in a petition which are intended as a basis for a writ of attachment, do not touch the cause or right of action; and if insufficient, cannot be reached by demurrer.

Where the allegations in a petition for an attachment, are insufficient, or where they are improperly alleged, they are to be reached by a motion directed at the writ of attachment.

Where an action was brought on three promissory notes, and a book account, to which the defendant answered, alleging that he did not owe the account; that the promissory notes were signed by him as accommodation notes only, for the benefit of St. M., who was the real debtor, and who put them in circulation; that the larger of said notes was afterwards taken up and paid by St. M.; that the other two notes came into the hands of T. and H., who obtained payment of them, by suit, judgment, and execution; and that the plaintiff did not hold the notes in his own right, but as assignee of St. M., for the benefit of his creditors; to which the plaintiff replied, denying that the notes were given for the accommodation of St. M., and that he was the real debtor; denying that the two notes were paid by suit, &c.; and averring that no suit was ever commenced or judgment recovered against the defendant, prior to the commencement of this suit; and where it appeared that the plaintiff, St. M. and T. & H. resided in St. Louis; that St. M. had indorsed the two notes to T. & H., who commenced an action against the present defendant, as maker, and St. M. as indorser; that no service was had upon C., who was then residing at Dubuque; that T. & H. discontinued the action as against C., and took judgment against St. M.; and that execution issued on this judgment, which was returned satisfied; and where C. offered in evidence the transcript of the judgment against St. M., which was objected to, and the objection sustained; *Held*, That the judgment against St. M., constituted no defence for C., and was properly ruled from the jury.

Where in an action on three promissory notes, the defendant pleaded that the plaintiff held the notes as assignee of St. M., for the benefit of his creditors, and that the notes were accommodation notes for the benefit of St. M.; and where the defendant gave the plaintiff notice to produce the original assignment from St. M., which not being produced, the defendant claimed that such refusal raised the presumption that the assignment contained something that

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would defeat the plaintiff's right to recover, which view of the law, the court overruled; *Held*, That the neglect or refusal of the plaintiff to produce the original assignment, only had the effect to admit secondary proof; and that there was no error in the ruling of the court.

Appeal from the Dubuque District Court.

THE plaintiff sued on two promissory notes of five hundred dollars each, and one of nine hundred and forty two dollars, payable to Edward St. Michael, or order, and upon an open account for merchandise sold to defendant, by St. Michael, all which demands are alleged to be duly assigned to Hunt, the plaintiff. The defendant contends, that Hunt cannot sue on these demands as in his own right, for that he holds them only as the assignee of St. Michael, for the benefit of creditors. And then he pleads that he does not owe the account, and that the notes are (as to him) accommodation notes, signed at the request of St. Michael, who is the real debtor. The remaining facts will appear in the opinion of the court, in connection with the questions made. Judgment was rendered for the plaintiff, and the defendant appeals.

Smith, McKinlay & Poor, and *Wm. Vandever*, for the appellant.

The general rule laid down in 1 Chitty Pl. 1, is that "the action should be brought in the name of the party whose legal right has been affected, or by or against his personal representative." This is also the rule of the Code, § 1676. "In actions brought by or against particular persons, as assignees, executors, &c., the special character in which they sue should be stated in the commencement, though it would be sufficient, if it appeared in other parts of the declaration." 1 Tidd's Prac. 432; 1 Chitty's Plead. 284; 1 Saund. Plead. & Ev. 413.

A cause of action which arises subsequent to an assignment, or subsequent to a decree of bankruptcy, it seems, may be prosecuted by the assignee in his own right, and so as to contracts made by an executor; but where the cause of action arose prior to the assignment, or to the issuing of a de-

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cree in bankruptcy, the assignee must be described in the declaration in his representative character. Owen on Bankruptcy, 258; *Evans v. Mann*, Cowper's Rep. 569. In the latter case, Lord MANSFIELD says: "On consideration, there seems to be this distinction. If the assignees bring an action on a contract made by the bankrupt before his bankruptcy, they must state themselves in the declaration to be assignees." In the case at bar, the cause of action arose prior to the assignment.

The plaintiff relies upon the case of *Roop v. Clark, guardian of Seeton*, decided by the Supreme Court of Iowa, at June term, 1854. That is not a parallel case. In that case, the action was brought in the name of Seeton, an insane person; and the court, under sections 1698 and 1699 of the Code, allowed the name of the guardian to be substituted and the suit went on without abatement. There was no change of parties in interest. The same legal right was affected both before and after the substitution. But in the case at bar, there is no question but that Hunt, who sues in his own right, should only occupy a representative position. He denies his representative character; we have proved it, and the issue being found against him, it is respectfully submitted that the suit must fail. The Supreme Court at the same term that they decided the case of *Roop v. Clark*, just referred to, also decided, in the case of *Taylor, adm'r, &c. v. The Stage Company*, that a person suing in a representative capacity cannot blend in the same action, matters which pertain to them in an individual capacity. To permit Hunt to bring this suit in his own right, would be to permit such a mixture of individual rights and of rights in a representative capacity; although such might not be the case in the present suit. To permit a representative to sue in *his own right*, would also prevent a defendant from pleading any proper matter of set-off he might have against the *real* owner of the claim sued on.

Burt & Barker, for the appellee. [No brief of the counsel for the appellee, was found among the papers.]

WOODWARD, J.—The plaintiff's petition was drawn as if he claimed to recover on the demand, sued in his own right, as he is not alleged to be an assignee, nor as claiming in any other representative character. The facts, it is apparent, would materially affect defendant's right of defence on the notes. But no question is made as to the manner of getting at this. The defendant pleaded in abatement to the petition, that plaintiff had no right to recover in his own name alone, and as for his own benefit, but that he held in a representative character, and must sue as such. The plaintiff took issue on this plea. The issue was found for the defendant, and then before judgment, the plaintiff asked leave to amend, which was granted; and to this the defendant excepted. The propriety of allowing this amendment at that stage of the suit, is the first question for our determination. In the case of *Bebb v. Preston, as garnishee*, 3 Iowa, 325, this court held, that an amendment may be made after the trial of an issue, and the cause has been taken to the Supreme Court and reversed, and sent back for a new trial. It is here that this militates against the common law ideas, but it is within the letter, and we believe within the spirit too, of the Code, § 1758. Our present system aims to get at the essentials of pleadings, and to allow amendments, rather than send a party out of court, subject, of course, to the terms which may be put upon him, which terms are entirely within the control of the court.

A party asking an amendment at so late a stage as in the present case, would naturally expect to pay the whole expense caused by the issue; and what is the substantial difference between this and his taking a nonsuit and commencing again, except that by taking an amendment, rather than a nonsuit, time is spared, and an action or a cause of action is sometimes saved, which would otherwise be lost, as by a limitation, or by other cause; and this is the precise effect which we understand our present system of statute law, in relation to pleading, to aim at. It is to save the rights of persons, and not to have them sacrificed to the mere rules of pleadings, if they can be placed in a correct attitude, the

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party himself bearing the expense of setting his case right. It is not intended to intimate that there may not be cases where the amendment could not be made on any terms, but these remarks apply to those cases which come within the reach of amendments. We think, that an amendment showing the character in which the plaintiff sues, but not changing the plaintiff, is admissible.

The plaintiff having amended, so as to show his trust or representative character, the defendant demurred to the petition as amended, on the ground that it did make a case which warranted the issuance of the writ of attachment. This demurrer then goes to the facts forming the basis for the attachment. These are not demurrable, for they do not touch the cause, or right of action. Our attachment law seems to recognize the praying for an attachment, either by separate petition or in the principal petition; but, in the latter case, these allegations no more form a ground for demurrer to the action, than in the former. In either case, if sufficient be not alleged, or if it be badly alleged, it is reached by a motion directed at the attachment. The demurrer was properly overruled.

The defendant then answered the amended petition, alleging that he did not owe the account; that the promissory notes were signed by him as accommodation notes only, for the benefit of St. Michael, who was the real debtor, and who put them in circulation; that the larger of said notes for \$942, was afterwards taken up and paid by St. Michael; that the two notes for five hundred dollars each, came into the hands of Thomas & Hudson, who obtained payment of them by said judgment, and execution; and that the plaintiff did not hold these demands in his own right, but as assignee of St. Michael, for the benefit of his creditors. To this the plaintiff replies, denying that the notes were given for the accommodation of St. Michael, and that he was the real debtor. He farther denies, that the two notes of five hundred dollars were paid by suit, &c., against this defendant, (Collins,) and he avers that no suit or judgment, was ever commenced or re-

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covered upon said notes, against this defendant, prior to the commencement of this action.

Under these pleadings, on the trial the defendant offered in evidence the transcript of a judgment, rendered in Missouri, in relation to which, it is necessary to state the facts. The plaintiff, Hunt, St. Michael, with Thomas & Hudson, resided in St. Louis. St. Michael had indorsed the two notes of five hundred dollars, to Thomas & Hudson, who commenced an action against Collins as maker, and St. Michael as indorser. No service on Collins was procured, he residing in Dubuque. Those plaintiffs discontinued the action as against him, and took judgment against St. Michael. Execution issued, which is returned satisfied. On the trial of this action in Dubuque county, the transcript showing the above matters, was offered in evidence by Collins, the defendant. Being objected to by the plaintiff, Hunt, the court ruled it out. To this the defendant excepts. It was important to the defendant, that it should appear in some manner, either by his own pleading or by the plaintiff, (and might it not be made to appear in either way?) that the plaintiff held as assignee, and not in his own right, for then he had only the rights of St. Michael, and defendant could show that they were accommodation notes; but for what does he wish to introduce the transcript of the judgment from Missouri? It is to show that St. Michael had paid the notes. And of what consequence is this fact to the defendant? The only important issue was, whether the notes were signed by him for the accommodation of St. Michael. If they were accommodation notes, then neither St. Michael, nor his assignee, Hunt, could recover against Collins, whether the former had paid them or not. It was immaterial to Collins, whether they were paid or not, and whether judgment had been recovered on them against St. Michael, so far as regards the relations between them, the maker and payee.

On the other hand, if they were not accommodation notes, then St. Michael or his assignee, have a right to recover on them, whether paid to the indorsees of the latter or not. In other words, in the one case St. Michael could not recover

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of Collins, whether the former had paid or not, and in the other, he could recover with the same indifference in respect to his paying. The same train of thought shows that the judgment offered in evidence, formed no defence for Collins. He needed only to show that the notes were an accommodation transaction, and that being done, there was an end of the plaintiff's case; and failing to make this showing, there was equally an end to his own case, so far as it depended on this issue. The refusal to admit the transcript was not error.

Another error is assigned on the following circumstances. The defendant gave notice to the plaintiff, to produce the original assignment from St. Michael. This not being produced on the trial, the defendant insisted, that such neglect or refusal, raised the presumption that the assignment contained something which would defeat the plaintiff's right to recover, which point the court ruled against him, and he excepted. We are not prepared to say, that the court erred here. It is very probable that such a refusal would, under circumstances, constitute an item to be considered, with others, by a jury, and from which they might make an inference, but we are not aware that there is such a definite and absolute inference of law, as is impliedly claimed. The neglect to produce, opened the door to secondary proof, but it is apprehended, that this was all the effect of it in the present case, when that circumstance stood alone, and that it did not of itself warrant the conclusion demanded by the defendant.

The foregoing thoughts cover the essence of the cause. As the issues formed, embraced the question of the accommodation character of the notes, and as that issue was found for the plaintiff, there is nothing of substance left, and the judgment of the District Court is affirmed.

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JONES v. IRELAND.

The fact that the words "ten per cent.," in a promissory note, are written in a different ink from the body of the instrument, and from the signature of the maker, does not cast upon the note such suspicion, that the plaintiff, before he can offer it in evidence, is bound to show that the words were made by authority of the maker, or before the execution of the note.

Whether a promissory note has been altered or not, is a question of fact for the jury, and not for the court.

By demurring to the evidence, a party cannot withdraw a question of fact from the jury, and submit its decision to the court.

The facts must be first ascertained and found, and admitted on the record, before a party can demur to the evidence.

By demurring to the evidence, the demurrant admits the truth of the facts found, and every conclusion in favor of the other party, which the evidence conduces to prove, or which the jury might have inferred from it, in favor of his opponent.

The object of a demurrer to evidence, is to obtain the opinion of the court upon the sufficiency of the evidence in law, to maintain the issue in fact.

An offer to demur to evidence, is not *stricti juris*.

If there be no colorable cause of demurrer to evidence, the court should not allow it.

Before joining in a demurrer to evidence, the plaintiff has the right to require an admission on the record, of the truth of all the facts that the evidence offered by him, tended to prove, or that the jury might infer from it in his favor.

Without such an admission upon the record, the plaintiff is not bound to join in the demurrer.

And if the plaintiff does join in a demurrer to evidence, without such an admission upon the record, the court can pronounce no judgment on the demurrer.

Where in a proceeding to foreclose a mortgage, the petition alleged, that M. sold to the defendant, certain lands for \$1,800, and to secure the payment of the purchase money, and ten per cent. interest, defendant mortgaged the lands back to M.; and that three promissory notes were given, which the mortgage was intended to describe, one of which had been assigned to plaintiff, and was due and unpaid; and where the answer of the defendant admitted the purchase of the land, but denied that the notes were executed to bear ten per cent. interest; and where, after *oyer* of the note, the defendant denied its execution, under oath, and that it was his deed, upon which issue was taken by the plaintiff; and a jury was impaneled to try the issue of fact; and where the words "ten per cent.," in the note, were written in pale blue ink, while the body of the note, was written in pale black ink, and the signature of the maker in black ink of a different color from that of the body of the note, but there was no erasure or interlineation on the face of the

4	69
81	288
4	69
85	323

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note; and where the defendant objected to the note being given in evidence, and the court thereupon ruled, after an inspection of the note and mortgage, that there was sufficient on the face of the note, to cast a cloud upon it, which plaintiff must explain, before he could recover, and that the note might be given in evidence, by complying with this rule; and where the note and mortgage were then given in evidence, and read to the jury, and the defendant rested his case, without any attempt to comply with the rule laid down by the court, and thereupon the defendant demurred to the evidence, which demurrer was sustained, because the ruling of the court had not been complied with, and judgment rendered for the defendant; *Held*, 1. That there was nothing on the face of the note, requiring explanation by the plaintiff, in order to maintain his action: 2. That the demurrer to the evidence admitted the fact in issue, that the note was the deed of the defendant, and must be so treated; and 3. That the court erred in sustaining the demurrer, and rendering judgment for the defendant.

Appeal from the Jones District Court.

PETITION to foreclose a mortgage. The plaintiff claims as assignee and holder of a note given by defendant, dated August 29th, 1853, payable eighteen months after date, to J. H. Merritt, or bearer, for five hundred dollars, with *ten per cent.* interest from date. He alleges, that Merritt sold to defendant certain lands, for eighteen hundred dollars, and that to secure the payment of the purchase money and *ten per cent.* interest, defendant mortgaged the land back to Merritt; and that three promissory notes were given, which the condition of the mortgage was intended to describe, one of which is the note sued on, which had been assigned to plaintiff, and was due and unpaid. He asks judgment for the note and *ten per cent.* interest, and a decree of foreclosure against the mortgaged premises, to satisfy the same. The note and mortgage are exhibited, and made part of the petition.

The answer of defendant, admits the purchase of the land, but denies that the notes were given, bearing *ten per cent.* interest; and having prayed *oyer* of the note sued on, and the same being read and shown to him, he says that the "same is not his deed, and denies the execution of the same, and that the note is a forgery." The answer was sworn to. The plaintiff's replication takes issue on the fact of the note being the deed of the defendant; and a jury were impaneled to

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try the question of fact. The defendant objected to the note being given in evidence. And thereupon the court ruled, that from an inspection of the note, coupled with the mortgage, there was sufficient on its face, to cast a cloud upon it, which plaintiff must explain and clear away, before he could recover; and that the note might be given in evidence, by complying with this rule. The note and the mortgage were then given in evidence, and without further objection, read to the jury, and plaintiff rested. The defendant demurred to the evidence. The note had the words "*ten per cent.*" written in it, in different ink from the body of the instrument, and from the signature of the maker, and this was all the evidence. It was claimed, that the evidence was not sufficient to entitle the plaintiff to recover, without some explanation on his part of the alleged alteration of the note. The demurrer was sustained, because the ruling of the court had not been complied with, and judgment rendered for the defendant. Plaintiff excepts, and on appeal to this court, assigns the following errors: 1. The court erred in sustaining the demurrer to the evidence offered by the plaintiff; 2. In taking the case from the jury, and deciding a question of fact.

Smith, McKinlay & Poor, for the appellant.

1. For the effect of a demurrer to evidence, see 4 Phillipps on Ev. 784, and authorities there cited.

2. If blank spaces be left to be filled after execution, the consent of the party executing, that they shall be afterwards filled, is to be implied. Byles on Bills, 254, referring to *Wiley v. Moon*, 17 S. & R. 438; *Smith v. Crooker*, 5 Mass. 538; *Jordan v. Neilson*, 2 Wash. 161; *Boardman v. Gore*, 1 Stewart, 517; *Bank v. Cury*, 2 Dana, 142; *Stahl v. Berger*, 10 S. & R. 170; *Commonwealth v. McCord*, 4 Dana, 191; *Douglass v. Scott*, 8 Leigh, 43; *Richmond Manufacturing Co. v. Davis*, 7 Blackf. 412. We refer also to *Cumberland Bank v. Hall*, 1 Halst. 215; 2 Greenl. 147; *Curviss v. Tattersal*, 2 M. & G. 890. The fair inference from the face of the note is, that it was drawn before the rate per cent. was agreed on,

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and that it was filled after it was agreed on, and before the execution of the note.

Whitaker & Grant, for the appellee, cited the following authorities: Bouv. Law Dic. title Blank; Byles on Bills, 259; *Knight v. Clements*, 8 Adolph. & E. 215-35, Eng. Com. Law, 878; *Clifford v. Parker*, 2 Mor. & G. 909-40; Eng. Com. Law, 917; *Carviss v. Tattersal*, 2 Ib. 888; *Heriman v. Dickerson*, 5 Brig. 183; 15 Eng. Com. Law, 409; 2 Parsons on Cont. 229, note; Greenleaf's Ev. § 564, note 1; *Jackson v. Jacoby*, 9 Cow. 125; *Warring v. Smith*, 2 Barr. 119; 13 N. Hamp. 385; *Horrich v. Malen*, 22 Wend. 388; *Warren v. Layton*, 3 Harrington, 404; *Tillou v. Clinton & E. M. Ins. Co.*, 7 Barb. 564; *Walters v. Short*, 5 Gilm. 252; *Simpson v. Stackhouse*, 9 Barr. 186; *Paine v. Edsell*, 19 Penn. 178; *Wilde v. Ormsby*, 6 Cush. 314; *Warrington v. Early*, 22 E. & E. 208.

STOCKTON, J.—The issue to be tried was, whether the note sued on was the note of the defendant. The affirmation of this issue, lay on the plaintiff, and to establish it, he gave in evidence to the jury, the note and mortgage sued on. The defendant thereupon demurred to the evidence, and the cause of demurrer alleged is, "that the note given in evidence, had the words *ten per cent.* written in it, in different ink from the body of the instrument, and the signature of the maker." The demurrer was sustained by the court, because the plaintiff, being ruled by the court so to do, offered no evidence to clear away the cloud adjudged to exist on the face of the note, and judgment was rendered for defendant. Our first inquiry is, what were the facts proved? The original note and mortgage are, by agreement, produced for inspection in this court. The mortgage, dated August 29th, 1853, is given to secure the payment of "the following sums of money, at the times hereinafter stated, that is to say, the sum of \$800, to be paid on or before the 1st day of January, 1854; \$500, to be paid within eighteen months from this date; and \$500, to be paid in thirty-six months from this date—all

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said sums to bear interest from this date—being three several promissory notes, bearing date with this indenture." The note sued on, is in the following words: "\$500. Eighteen months after date, we or either of us, promise to pay Joseph H. Merritt, or bearer, the sum of five hundred dollars, for value received, with ten per cent. interest from date. August 29th, 1853. JAMES W. IRELAND."

The words *ten per cent.*, are written in pale blue ink, apparently in the same handwriting as the remainder of the note, which is written in pale black ink. The signature of the defendant, is in a different handwriting, and in black ink, of a different color from that of the body of the note. There is no erasure, and no interlineation on the face of the note. The defendant claims, that taking the note and the mortgage together, the words in blue ink, cast upon the note such suspicion, that the plaintiff was bound to show that they were made by authority of defendant, or before the execution of the note; and that otherwise the plaintiff could not recover. Of this opinion was the District Court, in sustaining the demurrer, and rendering judgment for defendant. We think, the judgment of the District Court is erroneous, and that the errors assigned by the appellant are well taken.

First. There was no sufficient evidence of any alteration of the note. Nothing appears upon the face of the note, to originate a suspicion, except the words written in blue ink, "*ten per cent.*" There is no erasure or interlineation, to insert these words, but they appear in their natural order and position, as if written when the remainder of the note was written, or inserted in a space left to receive them. It would be carrying the doctrine of presumption very far, indeed, to hold, that because these words appear written with ink of a somewhat different color, they throw such suspicion on the instrument, as to require that the party claiming under it, should explain it away, before he can recover. Admitting the rule to be, that as to negotiable instruments, the burden is upon the party claiming under it, to show that any obvious and material alterations had been lawfully made, we find no authority in America or England, which holds, that if words

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in the body of a note, appear to be written in different colored ink from the remainder of the note, the fact is of itself, sufficient to establish an alteration, which the party must explain before he can recover. An interlineation, particularly if accompanied by an erasure, in different handwriting, and different colored ink from that of the body of the instrument, and the signature of the maker, has been held to throw suspicion on it, as showing an alteration; and the burden of explanation is upon the party offering it. *Wilde v. Ormsby*, 6 Cushing, 314. This is as far, we think, as any of the American authorities have gone. The note sued on in this instance, being produced for inspection in this court, we are of opinion, that there is nothing upon its face, requiring such explanation by the plaintiff, in order to maintain his action.

Nor do we think that the case for the defendant, is in any essential degree strengthened by reference to, and inspection of, the mortgage given to secure the payment of the notes. If the note sued on had been described therein, as bearing, "*six per cent.*" interest, we should have been disposed to regard it with suspicion. But it will be perceived, that the mortgage does not purport to set out or describe the notes with accuracy and precision. It gives their dates, amounts, and maturity, each sum "to bear interest from this date." This would mean *six per cent.* interest, of course, if no other rate were agreed upon and expressed in the note. But the words, "to bear interest from date," may apply to a note bearing a greater rate of interest, and do not, *ex vi terminis*, and necessarily, mean to refer to and describe a note bearing *six per cent.* interest only. It will also be perceived, that there are other particulars in which the mortgage does not purport to set forth the note according to its very tenor. It does not describe the note as drawn to be signed by more than one person; nor as drawn payable to Merritt, or bearer. The note reads: "We, *or either* of us, promise to pay *Jos. H. Merritt, or bearer.*" Now, would it not be quite as reasonable to argue from these circumstances, that there had been an alteration of the note?

Secondly. We think, that whether there had been such an alteration of the note or not, is a question of fact for the jury, and not for the court. The defendant could not, by demurring to the evidence, withdraw this question from the jury, and submit its decision to the court. The facts must be first ascertained and found, and admitted on the record, before the party can demur to the evidence. By demurring, he not only admits the truth of the facts found, but he admits every fact and every conclusion in favor of the other party, which the evidence conduces to prove, or which the jury might have inferred from it in his favor. Without such admission, the weight, as well as the relevancy of the testimony, would be referred to the court, which is not the object of the demurrer to evidence—such object being to obtain the opinion of the court upon the sufficiency of the evidence in law, to maintain the issue in fact. Gould on Pleading, 480. But the office of the jury, is superseded only by admitting on the record, all the facts which they could find from the evidence in favor of the plaintiff, and denying their sufficiency in law to entitle him to recover. *Ib.* 482. Admitting, then, every fact and every conclusion in favor of the plaintiff, which the evidence offered by him conduces to prove, and every fact which the jury might have inferred from it in his favor—for such is the effect of the demurrer—we do not see how there should have been judgment against the plaintiff, and in favor of the defendant. The fact found is not that there had been an alteration of the note, or that it was different from its original form. This would not be the legitimate inference which the jury might draw from the evidence in favor of the plaintiff. The issue of fact imposed upon the plaintiff the duty of proving that the note was the deed of the defendant. We can give no other consequence to the demurrer, than an admission on the record of this fact. The plaintiff had the right to require it, before joining in demurrer. He does not thereby admit anything against his own case, but he has the right to require an admission on the record, of the truth of all the facts that the evidence offered by him, tended to prove, or that the jury might infer from it in his favor. The infer-

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ence that he had the right to require to be made in his favor, was that the note was without alteration.

We do not think we are going too far, in suggesting that in our opinion, this was not a case in which a demurrer to evidence, was the proper mode of proceeding: It is rather unusual in our practice, and is allowable only in the discretion of the court. An offer to demur, is not *stricti juris*. If there be no colorable cause of demurrer, the court should not allow it. The plaintiff relied on the note and mortgage, as sufficient to establish the affirmative of the issue. Confessing this evidence to be true, by the demurrer, is not the confession of any fact, on which the proper question of law can arise, and ought to be presented for the adjudication of the court. The plaintiff does not admit the alteration of the note, but seeks by giving it in evidence and presenting it for inspection, to raise a presumption in its favor, and to rebut any suspicion of its alteration. He has the right to require that this presumption be admitted on the record, before he joins in demurrer. Without it, he is not bound so to join; and if he does, the court can pronounce no judgment on the demurrer. Gould on Pleading, 487.

Neither is the fact of the alteration found. This could only be found by the jury. The court had no right to infer it. The execution of the note being denied under oath, the plaintiff was bound to prove the execution. The note was, however, read to the jury, subject to the ruling of the court, that the words "*ten per cent.*" should be explained by the plaintiff, before he could recover. On the usual proof of the execution of the instrument, it should, without reference to any suspicion of its alteration, have been admitted in evidence, leaving all testimony in relation to such alleged alteration to be given to the jury. The whole inquiry, whether there had been an alteration, and if so, whether in fraud of the defendant or otherwise, to be determined by the appearance of the instrument itself, or from that and other evidence in the case, should have been left for the jury. The whole is a matter of fact, and they must determine it, from the evidence before them. This is the rule established by the Su-

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preme Court of Vermont, in *Beaman v. Russell*, 20 Vermont, 215. And is more in accordance with our ideas of right, than any other decision coming under our notice, whether English or American. It is there said: "It will doubtless be the duty of the court, to give the jury proper instructions upon any given state of facts. But any instructions in regard to the burden of proof, should be founded upon a supposed finding of the jury in regard to the alteration, rather than upon any assumption of the court in regard to it, because the character of the alteration, whether suspicious or otherwise, is matter of fact for the jury, and not of law for the court." So in *Gooch v. Bryant*, 13 Maine, 386, the question was, when the alteration was made. The court held, that it was not of itself proof that it was done after signature. It might have been before. To hold that the presumption of law was, that the alteration was *prima facie* evidence that it was done after, would be a harsh construction. It would be exposing the holder to a conviction of forgery, unless he could prove that it was done before the signature. It would be to establish guilt by a rule of law, when there would be at least, an equal probability of innocence. Such cannot be the law. It is a question of evidence to be submitted to the jury. 13 Maine, 386. See also, *Clark v. Rogers*, 2 Greenleaf, 147; *Cumberland Bank v. Hall*, 1 Halsted, 215; *Baily v. Taylor*, 11 Conn. 531. Such is the authority of Greenleaf, § 564: "If any ground of suspicion is apparent on the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as of the person by whom, and the intent with which the alteration was made, as matters of fact to be ultimately found by the jury, upon proof to be adduced by the party offering the instrument in evidence." We conclude, therefore, that the court erred in sustaining the demurrer to the evidence, and in rendering judgment thereon for defendant.

The judgment will be reversed and set aside, and a *venire de novo* awarded.

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87	302
4	72
135	79

Where it appeared from the record of a cause, "that defendant filed an affidavit and motion to set aside the default heretofore granted, which motion coming on to be heard, the court overruled the same, and refused to set aside said default, and permit said defendant to answer, to which ruling the defendants at the time, excepted;" and where it was contended in the appellate court, that no judgment by default was entered against the defendant, as contemplated by section 1824 of the Code; *Held*, That it appeared sufficiently from the record, that the defendant was in default.

Under section 1831 of the Code, a defendant in default, for want of an answer, in a case where the damages are assessed either by the court or a jury, has no right to introduce evidence, for the purpose of reducing the damages, nor to address the jury, and comment on the evidence, nor to ask instructions.

Where a defendant in an action, who was in default for want of an answer, on the assessment of damages by a jury, asked leave to introduce evidence, for the purpose of reducing the amount of damages shown by the plaintiff—claimed the privilege of addressing the jury, and commenting on the evidence—and asked certain instructions—all of which, being objected to, were refused by the court, on the ground that the defendant had no right to do anything more than cross-examine the plaintiff's witnesses; *Held*, That the decision of the court was correct.

Section 1781 of the Code, which provides that after a cause is submitted to a jury, they must be kept together, without drink, except water, and without food, except when otherwise directed by the court, as to the rights of parties, is directory in its character, and has reference more particularly to keeping them together *until* they have agreed, and to what shall be provided for them during their deliberations.

If a jury separate *after* agreement, without the consent of the court, it may amount to misconduct on their part, for which they may be liable; but such separation does not necessarily make the verdict void, or so taint it, as to prevent its reception by the court.

Where the court, soon after the jury retired to consider of their verdict, adjourned for dinner, and before the court convened again, the jury agreed upon their verdict, sealed the same up, and separated, without leave of the court, and without an agreement of the parties, that they might so separate; and where the jury having been called into the box, and being inquired of by the court, if they had agreed upon their verdict, responded that they had, and passed the same to the clerk, sealed up in an envelope, to the reception of which verdict the defendant objected, but the objection was overruled; *Held*, That the verdict was properly received.

Appeal from the Marion District Court.

THE plaintiffs brought this action to recover damages, sus-

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tained by the failure of defendant to furnish a quantity of corn, and perform other parts of a certain contract in writing, which is set out in the pleadings. Judgment was rendered in their favor. Defendant appeals, and the material facts of the case will sufficiently appear from the opinion of the court.

W. H. & J. A. SeEVERS and *J. E. Neal*, for the appellant.

Knapp & Caldwell, for the appellees.

WRIGHT, C. J.—Various errors are assigned in this case, but they may be appropriately considered under two heads:

First. Did the court err in rejecting defendant's evidence, in refusing to permit his counsel to address the jury, and in refusing the instructions asked by him?

Second. Was there error in receiving the verdict of the jury, under the circumstances disclosed in the record?

These questions we shall proceed to dispose of as briefly as possible, in the order presented. The defendant failed to answer the plaintiff's petition, and when the cause went to the jury, was in default. He says, however, that no judgment by default was entered against him, as contemplated by section 1824 of the Code. But the record shows, "that defendant filed an affidavit and motion to set aside the default heretofore granted, which said motion coming on to be heard, the court overruled the same, and refused to set aside said default, and permit said defendant to answer, to which ruling the defendant at the time excepted." We think this is sufficient to show, with reasonable certainty, that defendant was in default, as much so as if the record had said, in so many words, that judgment by default was entered against him. It does not stand upon his mere failure to answer, without any step taken as a consequence thereof by plaintiff, but it appears affirmatively, that he moved to set aside the default *heretofore granted*; that this motion was overruled; and that the court refused to set aside said default. A default had, therefore, been *granted*, and of course, by the order and di-

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rection of the court, on the plaintiff's motion. Being thus in default, what were his rights under the law?

By the Code, (§ 1831,) it is provided that, in cases of default, where the damages are assessed either by the court or jury, the defendant may appear at the time of the assessment, and cross-examine the plaintiff's witnesses, *but for no other purpose*. This language is clear, and we think can admit of but one construction. In this case, the defendant asked leave to introduce evidence, for the purpose of reducing the amount of damages proven by plaintiff; claimed the privilege of addressing the jury, and commenting on the evidence; and finally asked certain instructions, all of which being objected to by plaintiffs, were refused by the court, upon the ground that defendant was in default, and had no right, to do more than cross-examine the plaintiffs' witnesses. Now, we think it has been well said in argument, that if, under this statute, a defendant, when in default, may introduce evidence, address the jury, and ask instruction, then he loses comparatively nothing by his laches, and the words of the law would be meaningless. If, when the Code says, that he may appear for a certain purpose, and for none other, he may be allowed all the privileges here claimed, then why not introduce evidence to sustain a distinctive defence? why not let him in for all purposes? To permit him to appear for all purposes, and to the same extent, as if he had fully answered, would no more violate the letter or spirit of the law, than to allow him to do *one* thing, or take *one* step, which the law says he may *not* do or take.

The case of *Hutchinson v. Sangster*, June term, 1854, cannot be said to be in point. In that case, the defendant did answer, but it was held bad on demurrer. He, therefore, rested upon the sufficiency of his answer, and after the conclusion of the plaintiff's testimony, asked leave to address the jury, and for certain instructions. It was held, in that case, that the leave should have been granted, and that he had a right to ask instructions, upon the ground that he did not fail to file his answer, nor withdraw his pleadings, and was not, therefore, in default within the meaning of the Code. It

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is said in that case, that "the judgment was rendered as the result of a *defective* answer, and not in *default of an answer*." Without committing ourselves to the correctness of the distinction there made, it is sufficient to say, that that case clearly recognizes the construction given by us to the Code, when there is, in fact, a judgment in default of an answer.

We next inquire, whether there was error in receiving the verdict of the jury, and rendering judgment thereon. The bill of exceptions states, that soon after the jury retired to consider of their verdict, the court adjourned for dinner; and before the court convened again, the said jury agreed upon their verdict, sealed the same up, and separated, without leave of the court; nor did the parties agree that said jury might so separate. The jury having been called into the box, and being inquired of by the court, if they had agreed upon their verdict, responded that they had, and passed the same to the clerk, sealed up in an envelope, to the reception of which verdict the defendant objected, but the objection was overruled, and he excepted. To sustain the objection, appellant's counsel have referred us to several sections of the Code, and particularly to §§ 1780-81. By these sections, it is provided, that "at any time before a cause is submitted to the jury, they may be permitted to separate, under the proper instructions of the court;" and that "after the cause is submitted, they must be kept together, without drink, except water, and without food, except when otherwise directed by the court." And in § 1785, it is further provided, that "when, by consent, the jury have been permitted to seal their verdict and separate before it is rendered, such sealing is equivalent to a rendition and recording thereof in open court. The jury shall not be polled, nor shall they be permitted to disagree thereto, unless such a course has been agreed upon between the parties."

From these sections, as well as upon general principles, it is claimed that the jury, *after* agreeing upon their verdict, had no right to separate, there being no agreement of the parties to that effect; and that to receive their verdict under such circumstances, was error. In this view, we cannot con-

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cur. It is doubtless true, that it would be more regular, and there would be less liability of prejudice to parties, if jurors should be required in all cases, to deliver their verdict before separation. We think, that § 1781, however, is, as to the parties' rights, directory in its character, and has reference more particularly to keeping the jury together *until* they have agreed, and to what shall be provided for them during their deliberations. If they separate *after* agreement, it may amount to misconduct on their parts, for which they may be liable; but such separation, would not necessarily make the verdict void, or so taint it, as to prevent its reception. We say not necessarily. There might be cases, where after the separation, the verdict had been changed—or where, during the recess, some of the jurors had been tampered with, and induced to re-assemble and make another and different verdict; and under such circumstances, their action would be clearly irregular and improper, and their finding should be at once set aside; but this would be a consequence, not of the separation, but of their improper conduct during and after their separation. In this case, however, they were kept together until they had agreed; during their retirement, court adjourned; having agreed and carefully sealed their verdict, they separated; at the coming in of the court, all being present, thus sealed up, it was delivered by them to the clerk, and by them there acknowledged to be their verdict; and as such, it was opened and read in their presence. There is not the least ground for an intimation, that the verdict had been changed; that they had been tampered with; nor that the verdict was different from what it would have been had the jury continued together. The objection would have more weight, if the separation had taken place before agreement. But even then, we do not believe that fact alone would render it bad. Where the separation is *after* the agreement, however, we have no hesitation in holding that it may be received; and if not otherwise attacked, will be good. See upon this subject generally, *Ragland v. Wells*, 6 Leigh, 1; *Blake v. Blossom*, 3 Shep. 394; *Harrison v. Rowas*, 4 Wash.

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C. C. 32; *Ex parte Hill*, 3 Cow. 355; *Erwin v. Saunders*, 1 Ib. 243; *Smith v. Thompson*, Ib. 221; *Oram v. Bishop*, 7 Halst. 153; *Horton v. Horton*, 2 Cow. 589; *Wright v. Burchfield*, 3 Ham. 352.

Judgment affirmed.

MORROW v. WEED.[1]

As to courts superior and of general jurisdiction, every presumption is in favor, not only of their proceedings, but of their jurisdiction.

This presumption does not prevail, however, in relation to the jurisdiction of a court inferior and of limited jurisdiction, but such jurisdiction must be shown.

When the *jurisdiction* of an inferior court is shown, then the same presumption prevails in favor of its proceedings, that does in favor of those of a superior court.

Whatever intendment may be made in favor of the decision of an inferior court, there can be none in aid of its right to decide.

When inferior courts have not transcended their powers, and their jurisdiction has actually attached, such jurisdiction will not be lost by an irregularity in the mode of exercising it; and every intendment will be made in aid of the validity of the proceedings under it, which will be regarded as equally conclusive with those of courts of superior and general jurisdiction.

A superior court is presumed to act rightly, and within its jurisdiction.

An inferior court should set out the requisite facts on the face of its proceedings: and when the jurisdictional facts are thus stated, such statement is taken as *prima facie* evidence, or they are presumed to be as stated.

When a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court.

Jurisdiction is conferred: 1. By the law; 2. By a petition, or whatever stands in its place; 3. By notice, when such is required.

If there be a petition, or the proper matter of that nature, to call into action the power or jurisdiction of the court, its sufficiency cannot be called in question in a collateral proceeding.

If there be a notice or publication, or whatever of this nature the law requires,

[1] This cause was argued and determined at the June term, 1856, at which term, a rehearing was granted, and the cause continued until the December term, 1856, when the opinion on the rehearing, and affirming the former decision, was delivered.

4	77
79	365
4	77
88	537
4	77
104	362
4	77
107	323
4	77
125	377
125	378
4	77
134	684

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in reference to persons or other matters, its sufficiency cannot be questioned collaterally.

Where in an action of right, the defendant claimed title to the land in controversy, under an administrator's sale, made under the statute of wills, approved February 13th, 1843, and it appeared from the proceedings of the Probate Court, that on the 30th of July, 1846, the administrator filed his petition in said court, praying for a license to sell the said real estate, which petition alleged, that the indebtedness of the estate amounted to about \$1,500, and the charges of administration to between \$150 and \$200, and that the personal estate was insufficient to discharge that amount—upon the hearing of which petition, the said court held the sale to be necessary, and made an order accordingly; and where it was objected in the action of right, that the petition was insufficient, for the reason that it did not state the value of the personal property, and that no specific account of the debts due by the defendant, was filed with the petition; *Held*, 1. That the petition was sufficient, under the third section of chapter ten of the act of 1843; and that it was within the jurisdiction of the Probate Court, to decide upon the sufficiency of the petition; 2. That the statute did not require a specific account of the debts due from the deceased to be set out.

Where in an action of right, the defendant, to prove title in himself, offered in evidence the record of the proceedings in the Probate Court, on an application of an administrator, for a license to sell the real estate in controversy, for the payment of the debts of the intestate, under the statute of wills, approved February 13th, 1843, from which it appeared that the said court, ordered the sale of said real estate, after giving public notice thereof, for three successive weeks, in a specified newspaper; and where it was agreed between the said parties, that the said notice of said sale was published in the newspaper specified by the Probate Court, on the 31st of July, and the 7th and 14th of August, 1846, and that the sale took place on the 15th of August, 1846; and where in said action of right, it was objected that the publication of the notice of sale was insufficient, for the reason that it was not published three full weeks; *Held*, 1. That the publication was sufficient: 2. That the sufficiency of the notice of sale, was a question for the adjudication of the Probate Court, and that if its decision was erroneous, an appeal was the proper method for correcting the error.

Appeal from the Muscatine District Court.

THE plaintiff, the daughter and heir at law, of James G. Morrow, deceased, brings her action to recover lot 10, in block 55, in Muscatine, Iowa. The title to the lot was in the deceased, and is in the plaintiff, unless it was divested by a sale thereof, by J. L. Parmer, as administrator on the estate of J. G. Morrow. Brooks bought at the sale, and con-

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veyed to Weed. The only questions made, are upon the proceedings of the Probate Court, granting the license, and upon those of the administrator.

On the 30th July, 1846, the administrator filed his petition in the Probate Court, praying for leave to sell certain real estate, of which the lot in question was part, and representing that the indebtedness of the estate, amounted to about \$1,500, and charges of administration to between \$150 and \$200, and that the personal estate was insufficient to discharge that amount. The court ordered notice "of the pendency of the petition, to all interested, by advertising for three successive weeks in the *Bloomington Herald*." An affidavit of such publication was filed. The records of the Probate Court of the 25th of July, recite that, "the court being satisfied, that all interested have been duly notified of the hearing of said petition, and of the necessity of said sale," thereupon orders the administrator to sell, "first giving public notice thereof, by publishing the same for three successive weeks, in the *Bloomington Herald*, and taking the oath required by law." No bond is required. The administrator took the oath prescribed by the statute, and made sale. On the 10th of October, 1846, he made a report, setting forth the specific property sold, to whom, and for what sums. His report says, that, "legal notice of said sale, was published in the *Bloomington Herald*, an affidavit of which fact, you have filed in your office." Upon this, the court passed an order which recites, that the "foregoing report of the sale, &c., has been duly examined and approved." And the administrator is ordered to execute deeds to the purchasers. The *notice of sale*, is not found among the papers and records of the court; but it is agreed, that it was published in the said paper, on the 31st of July, and the 7th and 14th of August, and that the sale took place on the 15th of August. A verdict was rendered for the plaintiff, by agreement, subject to the opinion of the court on the law, as applicable to the above facts; and subsequently a judgment was rendered in favor of the plaintiff, from which the defendant appeals.

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Richman & Brother, for the appellant.

1. Where notice was not served on minor heirs, and the sale purported to have been made by one of two administrators, the sale was held not void. *Doe v. Harvey*, 5 Blackf. 487; *Robb v. Lessee of Irwin*, 15 Ohio, 699; *Lessee of Snevely v. Lowe*, 18 Ohio, 368. Where land was sold at private sale, contrary to the statute, the sale was held erroneous, but not void, and the purchase under it was valid. *Thompson v. Doe*, 8 Blackf. 336. An administrator's sale may be voidable as to first purchaser, yet valid as to second purchaser. Appellant is a second purchaser. *Piatt v. Heirs of St. Clair et al.*, 6-7 Ohio, 490. As to presumptions in favor of administrator's sales, see *Heirs of Ludlow v. Johnson*, 1-4 Ohio, 685; *Lessee of Goforth v. Longworth*, 1-4 Ohio, 750; *Lessee of Ewing v. Higby*, 6-7 Ohio, 342. The proceedings cannot be impeached collaterally. *Lessee of Adams v. Jeffries*, 12 Ohio, 271. And the rule is the same in attachment cases. *Lessee of Puine v. Mooreland*, 15 Ohio, 435.

2. That the judgment of a court having general jurisdiction, cannot be collaterally impeached, see *Newham's Lessee v. City of Cincinnati*, 18 Ohio, 323; and that a probate court is one of general jurisdiction, see *Doe v. Smith*, 1 Carter, 456; *Doe v. Haumal*, 3 Harrison, 79; *Grignon's Lessee v. Astor*, 2 Howard, 319; *Propst v. Meadows*, 13 Illinois, 169.

George S. Hebb, for the appellee.

The first question presented for examination is, can the judgments of courts of superior or of limited and inferior jurisdiction, be impeached in a collateral proceeding; and if the judgments of either of such courts can be thus questioned, to what extent can they be thus attacked? While the proceedings of courts of superior jurisdiction must be presumed to be correct, the acts of courts of limited and inferior jurisdiction cannot be so presumed; but it must appear affirmatively, that all the acts requisite to confer jurisdiction were performed; and that when such acts do not so appear upon the face of the proceedings, and are not proved *aliunde*, the whole proceedings, when examined collaterally, will be set

aside and declared null and void. To sustain this point, we cite the following authorities: *Ford v. Babcock*, 1 Denio, 158; *Bloom v. Burdick*, 1 Hill, 130; *Dakin v. Hudson*, 6 Cowen, 221; *Sherman v. Ballou*, 8 Cowen, 304; *Bigelow v. Stearns*, 19 Johnson, 39; *Borden v. Fitch*, 15 Johnson, 121; *In the matter of Underwood*, 3 Cowen, 59; *Jenning v. Corwin*, 11 Wendell, 647; *Smith v. Rice*, 11 Mass. 507; *Proctor v. Newhall*, 17 Mass. 91; *Thatcher v. Powell*, 6 Wheaton, 119; *Jackson v. Esty*, 7 Wheaton, 148; *Rea v. McEachron*, 13 Wheaton, 465; *Atkins v. Kinnan*, 20 Wend. 241; *Parker v. Rule's Lessee*, 9 Cranch, 64; *Williams et al. v. Peyton's Lessee*, 4 Wheat. 77; *Stephens v. Ely*, 6 Hill, 607; *Connell et al. v. Barnes*, 7 Hill, 35, and note *e*; *The People v. Koerber*, 7 Hill, 40; *Sharp v. Spier*, 4 Hill, 76; *Corwin v. Merrill*, 3 Barbour, 341; *Reed v. Wright*, 2 Greene, 15. Indeed the courts in America, have gone so far as to give color to the assertion, that the acts of courts of superior, as well as of limited and inferior jurisdiction, may be attacked and declared null and void in collateral proceedings. *Williamson v. Berry*, 8 Howard, 497; 6 Howard's (Miss.) 106; 1 Smedes & Marshall, 351; 7 Ib. 85; 2 B. Monroe, 453; 4 Peters, 466; 1 Peters, 340; 13 Peters, 498; *Skinner's Lessee v. Lynn et al.*, 2 Howard, 43; 8 Howard, 566. We only claim as the extent of these decisions: 1. That the acts of courts of superior jurisdiction are void, when manifestly beyond their jurisdiction; and 2. That the acts of courts of inferior and limited jurisdiction, are not valid, unless *prima facie* within their jurisdiction.

The statute under which these proceedings were had, is chapter 162 of Revised Statutes, approved February 13th, 1843. Sections one, two and three of sub-chapter 10, of chapter 162, provide as follows: "When the goods and chattels of any deceased person, in the hands of his administrator, shall be insufficient to pay all his debts, with the charges of administration, his administrator may sell his real estate for the purpose, upon obtaining a license therefor, and proceeding therein in the manner hereinafter provided." "Such license may be granted by the District Court, or by the Court of Probate, in the county in which

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the letters of administration were granted." "In order to obtain such license, the administrator shall present to the court a petition, setting forth the amount of the debts due from the deceased, as nearly as they can be ascertained, and the amount of the charges of administration, and the value of the personal estate; and if it shall be necessary to sell only a part of the real estate, he may also set forth the value, description and condition of the estate, or of such part thereof as he shall propose to sell; and the court may, in all cases where it is not necessary to sell the whole, decide and direct what part of the estate shall be sold."

Section 9 of the same sub-chapter 10, provides: "If the facts set forth in the petition shall be proved to the satisfaction of the court, and if no sufficient cause be shown to the contrary, the court shall grant the license." And section 36 provides, that if any one shall contest the validity of the sale, (authorized under the chapter,) it shall not be avoided on account of any irregularity in the proceedings, provided it shall appear: 1. That the administrator was licensed to make the sale by a court of competent jurisdiction. 2. That he gave bond, which was approved by the judge of probate, (in case any bond was required.) 3. That he took the oath prescribed in this chapter. 4: That he gave notice of the time and place of sale, as prescribed herein. And 5. That the premises were sold accordingly, by public auction, and are held by one who purchased them in good faith.

It was absolutely necessary that the administrator should present to the court a petition, setting forth the amount of the debts of the deceased, the charges of administration, and the value of the personal estate, in order to confer jurisdiction. It is true that the petition in this case, states the aggregate indebtedness, and the costs of administration; but it is wholly silent as to the value of personal estate, and simply alleges that the personal estate is insufficient to pay the debts of the deceased. The administrator should have filed, as part of his petition, an account specifically stating the indebtedness of the deceased, the costs of administration,

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as also the value, description and condition of the real estate, agreeably to the requirements of the statute, in order that the court should determine whether an order of sale should be passed, and whether the whole, or only a part, (and if only a part, then what part,) of the real estate should be sold. It is not for the administrator simply to allege the insufficiency of the personal estate, but under the statute, the court must determine whether the personal estate is insufficient to pay the debts of the deceased. How, then, can the court decide such question, unless the facts showing the insufficiency were presented to the court? The statute prescribes that such facts shall be presented by petition; and unless it appears that such facts were so shown to the court, the court was not a court of competent jurisdiction, and all the subsequent proceedings were *coram non judice*, and void. Upon this point the following cases cited, *supra*, are very clear and positive: *Ford v. Walsworth*, 15 Wendell, 449; *Bloom v. Burdick*, 1 Hill, 130; *Corwin v. Merritt*, 3 Barbour, 340; *Atkins v. Kinnan*, 20 Wendell, 241; *Ford v. Walsworth*, 19 Wendell, 334.

Again: section 13 of the same sub-chapter, provides, "that the court which licenses the sale, may order the public notice of the time and place of sale to be published three weeks successively in any newspaper," (instead of the first notice, in the first part of the section.) The court ordered that notice should be published for three weeks successively before the day of sale, in the "Bloomington Herald." It nowhere appears, in the proceedings before the Probate Court, that the administrator gave the notice as prescribed by the statute, and directed by the court. It was admitted below, that notice was published three times in the "Bloomington Herald;" that the first publication was on the 31st of July, the second on August 7th, and the third on August 14th, and the sale on August 15th. It is therefore manifest, that the administrator did not give the notice of the time and place of sale, as prescribed by the statute, and directed by the court. The cases cited, *supra*, fully sustain the doctrine, that where a statute prescribed that an act

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shall be done in a specific mode, that mode must be strictly complied with; and upon failure of compliance with the requirements of the statute, the court assuming jurisdiction acquired no jurisdiction, and its subsequent proceedings are a nullity. *Vide*, particularly, *In the Matter of Underwood*, 8 Cowen, 59; *Kennedy v. Grier*, 13 Illinois, 432; *Corwin v. Merritt*, 3 Barbour, 341. The statute enacts, that no sale shall be avoided on account of irregularity in the proceedings, provided five certain facts appear. Now, we take it, that all those facts must appear affirmatively to have been done; and upon failure to establish any one of the five required facts, the sale is irregular and invalid.

We have already shown, that the first requisite, jurisdiction, was never obtained by the Probate Court. This is, of course, conclusive as regards the other requisites; for if the court had no jurisdiction, a compliance, however strict, with the other requirements of the statute, could not cure the defect. But assuming, for the sake of the argument, that the court had jurisdiction, we have shown that the administrator did not give public notice of the time and place of sale, as prescribed by the statute, and directed by the court—which defect is fatal to those claiming under the administrator's sale. The five requirements of the statute, are the links of a chain, connecting the deed or title of the intestate with the deed of the purchaser. The removal or absence of a single link, breaks the chain of title, and the sale is irregular, and the purchaser takes no title.

The question is often asked, whether a court is to be deemed a court of superior or of inferior and limited jurisdiction? In this case, there can be no question. The Probate Court was one of inferior and limited jurisdiction; for it was the mere creature of the statute, deriving all its powers and duties—all its energies and life—from the statute. "The courts which, under the names of orphans' courts, courts of probate, and other appellations, are intrusted with the settlement of the personal estate of decedents, and in subordination to this, with the power to sell real estate, when the personal is insufficient to meet the charges upon

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it, are treated in some of the states, as inferior tribunals, and their decrees held to be voidable collaterally, by showing a want of jurisdiction, either in the cause itself, or over the parties. *Vide* 1 Smith's Leading Cases, (5th American edition,) 846, and the twenty-six cases there cited as sustaining the doctrine.

To recapitulate, we contend: 1. That while the jurisdiction of superior courts will be presumed, the judgments of such courts are void, in the absence of jurisdiction. 2. That the judgments of inferior and limited courts are nullities, unless such courts show affirmatively, that they had jurisdiction. 3. That the Probate Court in this cause, being the creature of the statute, is a court of special, inferior, and limited jurisdiction; that its proceedings, unless strictly conformable to the requirements of the statute, are invalid, and must be set aside in this collateral proceeding. 4. That the Probate Court was not a court of competent jurisdiction, inasmuch as the petition praying for license to sell the real estate of the intestate, did not comply with, or contain the specific requirements of the statute, so as to confer jurisdiction. 5. That assuming that the court had jurisdiction, the administrator did not give public notice of the time and place of sale, as prescribed by the statute, and directed by the court. 6. That the proceedings before the Probate Court were irregular and invalid, and that the sale made by the administrator, under the order of sale, passed no title to the vendee.

Henry O'Connor, on the same side.

The appellee submits the following propositions: 1. That the sale of the property by Palmer, as administrator, is void, for the reason that he has not complied with the requirements of the statute regulating sales of real estate by administrators. 2. That the purchaser at the administrator's sale, took no title, and could not pass any title to subsequent purchasers. 3. That the statute confers the only power the administrator has, to sell and convey the real estate of the decedent, and that unless the substantial requisites of the

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statute are complied with, the heir cannot be, and is not, divested of title. In support of these propositions, the court is referred to the following authorities: Revised Statutes of 1843, 705, 706, §§ 3, 4, 6, 8, 13, 14, 33, 36, 38, and chapter 10 of the Revised Statutes generally; *Bloom v. Burdick*, 1 Hill, 130; *Corwin et al. v. Merritt*, 3 Barbour, 341; *Reynolds v. Wilson*, 15 Illinois, 394; *Goforth v. Longworth*, 1-4 Hammond, (Ohio condensed,) 750; *Ford v. Walsworth*, 19 Wendell, 334; 1 Smith's Leading Cases, 828, and especially 882, and the authorities there cited; *Mayhew v. Davis*, 4 Mo-Lean, 213. These authorities are directly in point; and although authorities sustaining the principle for which we contend, might be multiplied almost indefinitely, we chose to cite those decisions which bear directly on cases of this character.

No rule of law, we think, is better settled, or more clearly established, than this, viz: that inferior courts, with limited or special jurisdiction, must, in the record of their proceedings, show *affirmatively*, that the law which confers the jurisdiction, has been substantially complied with; and that, if the record fail to show jurisdiction, the whole proceedings are void. *Bowman v. Ross*, 6 Cowen, 234; *Broadhead v. McConnell*, 3 Barbour, 175; *Holmes v. Mason*, 12 Illinois, 424; *Kilbourn v. Woodworth*, 5 Johnson, 37; *Hollingsworth v. Barbour*, 4 Peters, 467; *Moore v. Stark*, 1 Ohio (N. S.) 369; *Horner v. State Bank*, 1 Carter, 131; *Kinney v. Greer*, 13 Illinois, 432; *Jackson v. Shepperd*, 7 Cowen, 88; *Smith v. Rice*, 11 Mass. 506, 507; *Elliott v. Piersoll*, 1 Peters, 328. See, also, 2 Peters, 157; 3 Peters, 193; 6 Peters, 691.

Those authorities sustain the proposition we contend for, in its length and breadth, and would be, we think, in themselves, amply sufficient for the purposes of this case. But the principle is extended much further; and in a vast number of decisions, where the question is considered more especially with reference to the subject matter, we find this wholesome and sound doctrine, viz: that in the proceedings of a court of superior and general jurisdiction, while all presumptions are in favor of the validity of its proceedings,

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and the final record conclusive, not only of what it expresses, but also of all fair and legal implications, yet those courts, when invested by statute with *particular* and *special* powers, are, with regard to the exercise of those special powers, placed on precisely the same footing with inferior courts, or courts of limited jurisdiction; and especially is this true where superior courts are invested with *probate* and *surrogate* powers. In such cases, the record of a superior, as well as that of an inferior court, must show that the requirements of the statute have been substantially complied with, and that unless the record shows this, the proceedings are simply void, and may be disregarded or set aside in any proceeding, either collateral or direct, where their validity is called in question. Without enumerating the particular authorities sustaining this position, we refer the court to 1 Smith's Leading Cases, 885, and the authorities there cited.

Now we ask the court to examine the transcript from the Probate Court, which is the only evidence in this case, and then examine page 713 of the Revised Statutes of 1843, under the provisions of which this sale was made, and see if, by any view that can be taken of the matter, the *infant* heir in this case should be divested of the title to her inheritance.

WOODWARD, J.—The subject matter of this cause, namely, the law relating to the collateral impeachment of the proceedings of courts, has received quite a free investigation by this court, in the case of *Cooper v. Sunderland*, 8 Iowa, 114. Many questions arise—the cases are exceedingly numerous—and great confusion, and but little rule, prevails among them. In the case of *Cooper v. Sunderland*, we endeavored to ascertain some rules which should serve as guides in the decision of all similar cases; and to that, we refer for the principal part of our discussion of the subject.

In regard to courts superior, and of general jurisdiction, every presumption is made in favor, not only of their proceedings, but of their jurisdiction. 1 Smith's Lead. Ca. (5th ed.,) note, 820, 848, where the subject is considered,

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and the authorities cited. This presumption is not exercised, however, in relation to the jurisdiction of a court inferior and limited, but this must be shown. Note, *supra*, 816, with the authorities there cited. But when the *jurisdiction* of an inferior court is shown, then the same presumption prevails in favor of its *proceedings*, that does in favor of those of a superior court. Note, *supra*, 817, 848; *Reeves v. Townsend*, 2 Zabris. 396; *Wilson v. Wilson*, 18 Ala. 176; *Clark v. Blacker*, 1 Cart. 215; *Paul v. Hussey*, 35 Maine, 97; *Wright v. Warner*, 1 Doug. 384; *Fox v. Hoyt*, 12 Conn. 491; *Raymond v. Bell*, 18 Conn. 81; *Sheldon v. Newton*, 3 Ohio, (N. S.) 495. "Whatever intendment may be made in favor of the decision, there can be none in aid of the right to decide." *Perrine v. Farr*, 2 Zabris. 356; *Bridge v. Bracken*, 3 Chand. 75; *Supero Crawford Co. v. Le Clerc*, 4 Chand. 56; *Dempster v. Purnell* 3 M. & G. 375; *Rowland v. Veal*, 7 Cowp. 19. When inferior courts have not transcended their powers, "and their jurisdiction has actually attached, it will not be lost by an irregularity in the mode of exercising it, and every intendment will be made in aid of the validity of the proceedings under it, which will be regarded as equally conclusive with those of courts of superior and general jurisdiction." Note, *supra*, 847; citing *Grignon's Lessee v. Astor*, 2 How. 319; *McPherson v. Cimliff*, 11 S. & R. 422; *Reeves v. Townsend*, 2 Zabris. 396; *Clark v. Holmes*, 1 Doug. 390, and many other cases. It is admitted that the jurisdictional facts must appear, but much of the obscurity among the cases, arises from their looking into matters which are not of this character; and a little reflection will show us, that if we undertake to look into the *details* of the proceedings of a court, there will be no end to the cases, and no rule to guide them.

The next inquiry is: how shall the necessary facts conferring jurisdiction "be shown," or "appear?" A good deal of ambiguity seems to have arisen from the answer to this question, as made in practice. A superior court is presumed to act rightly and within its jurisdiction, but an inferior court should set out the requisite facts, on the face of its

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proceedings. See note, *supra*, 818, and many authorities. When the jurisdictional facts are stated on the face of the proceedings of an inferior court, this is taken as *prima facie* evidence, or they are presumed to be as stated. Note, *supra*, 816, 817-82, with numerous cases, for which we refer to *Cooper v. Sunderland*. The case does not require us to consider what is a superior and what an inferior court. But see the above note, heretofore cited, 824-846. "When a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court." *Elliott v. Piersoll*, 1 Pet. 828, 841; *Thompson v. Tolmie*, 2 Ib. 157; *Voorhes v. Bank of U. S.*, 10 Ib. 473; *Grignon's Lessee v. Astor*, 2 How. 319; *Wright v. Marsh et al.*, 2 G. Greene, 111, and other cases. The question, then, is, when does jurisdiction arise, or what gives jurisdiction? The answer is: first, the law; second, a petition, (or whatever stands in its place;) third, notice, (when such is required.) But the essentiality of notice, in proceedings so far *in rem* as administrators' and guardians' sales, is left doubtful.

But laying aside minor questions, we come to the points which will enable us to decide the case before us upon *rule*, and not merely upon detached cases. We think the cases will support the following two rules: If there be a petition, or the proper matter of that nature, to call into action the power or jurisdiction of the court, the sufficiency of it cannot be called in question collaterally. This is for the appellate power only. If there be a notice or publication, or whatever of this nature the law requires in reference to persons or other matters, its sufficiency cannot be questioned collaterally. Of course, this means a notice coming within the legal idea and range of such a matter. An absurdity could not be permitted to pass. *Smith's Cases*, *supra*, 837, 843; *Wight v. Sheldon*, 1 Seld. 497; *Borden v. The State*, 6 Eng. 519; *Ewing v. Higby*, 6-7 Ohio, 343; *Paine v. Mooreland*, 15 Ohio, 485; *Wright v. Marsh et al.*, 2 G. Greene, 109, 112.

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The case at bar arises under the same act with the case of *Cooper v. Sunderland*, namely, that of 13th February, 1843. Rev. Stat. of 1843, chap. 162, sub-chapter 10, 706. The objections made to the sale in this case, are: *First*. That the administrator's petition does not show the value of the personal estate. *Second*. That no specific account of debts is set forth. *Third*. That the notice of the sale was not published for a period of three weeks, although it was published on three several and successive weeks. The above sub-chapter 10, (§ 36,) provides as follows:

In case of an action relating to any estate sold by an administrator, in which an heir, or other person claiming under the deceased, shall contest the validity of the sale, it shall not be avoided on account of any irregularity in the proceedings, provided it shall appear:

First. That the administrator was licensed to make the sale by a court of competent jurisdiction.

Second. That he gave bond, in case any was required by the court.

Third. That he took the oath prescribed in that chapter.

Fourth. That he gave notice of the time and place of sale, as prescribed therein.

Fifth. That the premises were sold accordingly at public auction, and are held by one who purchased them in good faith.

The objections made are to be tried by these tests, and the somewhat ample examination made in the other case, served mainly to determine what constituted or gave jurisdiction, and how matters might legally "appear," in the sense of the statute.

First, Then, the court was one of competent jurisdiction. The law and the petition gave jurisdiction of the subject matter, and the notice, of the person. The objection that the petition was not a sufficient one, comes under one of the rules before stated. It was for the court to decide. It is matter of appeal or error, but cannot be brought up in this manner. This must be so; for if such questions can be raised in a collateral action, questions would be intermina-

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ble—a collateral action would become another mode of trying errors. Every justice of the peace could try the decisions of every other, and the highest tribunal, and no one could know when he had a conclusive judgment.

Second. No bond was required by the court.

Third. The administrator took the oath prescribed by the act.

Fourth. As to the notice of the time and place of sale. The act (chap. 10, § 11) authorizes the court to order notice to be published “three weeks successively.” The court ordered it “for three successive weeks.” The publication was on July 31st, and August 7th and 14th, and the sale on the 15th of August. The terms of the act admit of the question, whether three full weeks were required, or only a publication on some day in each of three weeks, so as to give at least two full weeks’ notice. This would not be unreasonable, for that is a longer time than is required to put a party to answer to a suit, however great the magnitude of the matter involved. According to the rule before stated, this, also, was a question for the adjudication of the court; and if its decision was erroneous, an appeal was the method for correcting it, and the error cannot be tried in this collateral action. If this were admissible, then every question relating to the sufficiency of a notice, and of its service, too, in any of the courts, could be brought up and reviewed in the same manner.

Fifth. No question is made relative to the *bona fides* of the sale and the purchase.

The objection to the sale must be overruled, and the sale held good. Therefore the judgment of the District Court is reversed, and a *procedendo* ordered.

Upon the delivery of the foregoing opinion, the appellee filed a petition for a rehearing, which having been granted, the cause was continued. At the December term, 1856, the cause was re-argued, by *David C. Cloud*, for the appellant, and *Richman & Brother*, for the appellee.

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David C. Cloud, for the appellee.

First. As to powers of courts created by statute. I start out with this proposition: A court acting under a naked power, derived from the statute, must comply with the requirements of the statute in every particular; nothing can be omitted, and no presumptions can be made in favor of its action in any particular. Not only must it observe and perform what the statute says it must observe and perform, but all its acts must be as the statute prescribes, and no other mode will do. Nothing can be omitted, else the acts of such a court will be void. When the statute says that a certain act must be performed in a certain manner, it must be performed in that manner, and no other will render the acts of a court of this character valid, in law or equity. In *Blackwell on Tax Titles*, on page 51, the author, in treating upon this class of powers, says: There is still another class of powers, more closely resembling the powers in question, and depending upon the statute for the mode and manner of their execution, and may therefore be properly termed statutory powers; such as the sales of land by administrators to pay the debts of an intestate, by guardians for the maintenance and education of their wards, proceedings for the condemnation of land for public use, and others of a like nature. "In all these cases, the power is special, and the proceedings are summary." If this special authority is conferred upon a superior court of general jurisdiction, which usually proceeds according to the course of the common law, the tribunal is regarded *quo ad hoc*, as an inferior court with special jurisdiction. The rule applicable to such a power, is thus laid down by Justice CATON, in reviewing a guardian's sale, (*Young v. Lorrain*, 11 Ill. 636, 637): "This is a proceeding not according to the course of common law, but a special jurisdiction conferred by the statute, and although in a court of general common law and chancery jurisdiction, yet when a court undertakes to exercise this extraordinary jurisdiction, which is not in conformity with either, it must appear upon the face of the record or proceeding itself, that the contingency existed, or at least was alleged, which au-

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thorized it to proceed under the statute, and make the order." The language of Chief Justice MARSHALL is similar; see *Thatcher v. Powell*, 6 Wheat. 119. He says: In summary proceedings, where a court exercises an extraordinary power, under a special statute prescribing its course, we think that course ought to be exactly observed, and those facts especially which gave jurisdiction, ought to appear, in order to show that the proceedings are *coram judice*. In other words, all of the facts which are essential to the exercise of the power, must affirmatively appear upon the face of the record—they cannot be supplied by proof or made out by intendment. The authorities upon this point are uniform.

"If, on the other hand, this special authority is conferred upon an inferior tribunal of limited jurisdiction, &c., the rule is still more strict. It is thus laid down. Where a special authority is delegated by statute to particular persons, or to any inferior tribunal, affecting the property of individuals against their will, the course prescribed by law must be strictly pursued, and appear to be so upon the face of the proceedings, or the power is not well executed; and it makes no difference in the application of this principle, whether the question comes before the superior courts by certiorari or collaterally. If the law has not been strictly complied with, the proceeding is a nullity, and the adjudication gives it no additional validity." See *Smith v. Hileman*, 1 Scam. 323; *Sharp v. Spier*, 4 Hill, 86, and the authorities therein cited. See also Blackwell on Tax Titles, pages 54, 55, 56, 57 and 58. In the case of *Smith v. Hileman*, above cited, which was an action of ejectment to recover a parcel of land, which the defendant claimed, under a sale made by the administrator, to pay debts, in pursuance to the order of the Circuit Court, the statute required the administrator to set forth, in his deed of conveyance, "the order of the court at large."

The deed omitted to set forth the order at large, but recited it substantially. The court held that no title passed by the deed. SMITH, J., in delivering the opinion says: "The reason of this provision, we are not at liberty to inquire into,

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nor what the supposed necessity may have been, in the opinion of the legislature, for its adoption. It is sufficient to perceive, that the recital of the substance of the order is not a compliance with, nor an observance of the act. A special power granted by statute, affecting the rights of individuals, and which divests the title of real estate, ought to be strictly pursued, and should appear to be so, on the face of the proceeding." The court will perceive that these were collateral proceedings, and that in each case they were treated as nullities.

In the following cited cases, the doctrine is fully recognized; indeed, a general principle is established, subject to no exceptions, that the validity of every involuntary alienation of land, depends upon a strict compliance with all the requirements of the law by which they are authorized—such as the taking of private property for public use, the extending of an execution upon land in the New England states, the sale of land by guardians, under an order of court, and also sales made by administrators of the real estate of their intestate, viz: *Wellington v. Gale*, 13 Mass. 483; *Young v. Keough*, 11 Ill. 642; *Smith v. Hileman*, 1 Scam. 323; *Atkins v. Kinnan*, 20 Wend. 241.

In support of the proposition that all proceedings which are had under, and by virtue of positive statutory enactments, must be conducted in the prescribed mode, and no other, see Blackwell on Tax Titles, pages 78, 79, 80 and 81. Judge HUBBARD, in 15 Vermont, page 72, says: "I am not very well satisfied with the summary mode of getting rid of statutory provisions, by calling it directory. If one positive requirement and provision of a statute, may be avoided in that way, I see no reason why another may not." Mr. Justice MORTON, in 22 Pick. 887, says: "Equitable constructions, though they may be tolerated in remedial and, perhaps, some other statutes, should always be resorted to with great caution, and never extended to penal statutes, or mere arbitrary regulations of matters of public policy. The power of extending the meaning of a statute beyond its words, and deciding by equity, and not by language, ap-

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proaches so near the power of legislation, that a wise judiciary will exercise it with reluctance, and only in extraordinary cases. This doctrine is daily gaining ground, and it is to be hoped that the day is not far distant when our courts will adopt the maxim of the Missouri court." Thus the law is written, and we do not feel called upon to give reasons why it is so. 9 Missouri, 878. See also *Early v. Doe*, 16 How. 610; *Doughty v. Hope*, 8 Denio, 595; *Varnick v. Tullman*, 2 Barb. 113; *Parker v. Rule*, 9 Cranch, 64; *Ronkendorf v. Taylor*, 4 Pet. 349; *Foreman v. Buffum*, 4 Cush. 267; *Lessee of Perkins v. Dribble*, 10 Ohio, 433; *Fitch v. Cusey*, 2 G. Greene, 300; *Mason v. Fearson*, 9 How. 248; *Jackson v. Esty*, 7 Wend. 148; *Atwood v. Collin*, 20 Pick. 418; *Williams v. Peyton*, 4 Wheat. 77; *Jackson v. Shephard*, 7 Cowen, 88; *Taylor v. Galloway*, 1 Ohio, 232.

All these authorities go to establish the position, that in all special proceedings, under a statute, the mode of procedure prescribed by the statute, must be strictly pursued, and that in this class of cases the records must show that the statute requisites have been complied with. Under our statutes, the proceedings of administrators and probate courts, in the settlement of estates, are special acts, depending upon the statute for all their power. All their acts must appear of record. See chap. 12, Rev. Stat. 718.

The Probate Court cannot adjudicate or decide upon the question of its own jurisdiction. It has jurisdiction, if certain facts appear. Those facts shall appear by the petition. See chap. 10, § 4, page 706. The Probate Court cannot say that the facts do appear, if the petition omits any one of the statute requisites. This statute is not directory, and cannot be evaded or omitted; all that the statute says, shall appear, must appear, and if a probate court improperly decides that it has jurisdiction, when one of the matters which the statute says shall be contained in the petition, is omitted, its decision is without authority of law, and therefore void. It cannot, by that improper decision, acquire jurisdiction, and make its own acts of such validity that they cannot be inquired into, in a collateral proceeding. The

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court has said in its opinion, that the fact that the Probate Court was satisfied that it had jurisdiction, was conclusive as to that fact, and that the only way to inquire into that fact, was by appeal, or writ of error. Such was the substance of the opinion of the court upon this point. With all deference to the court, permit me to say, that if the authorities I have quoted and cited above are law, then the opinion of this court is not law; for the reason that the same is in conflict with all the authorities I have found, and appears to me to be in conflict with the statute itself. The statute says, that the administrator in his petition must state, (with other things,) "the value of the personal property." This is not directory, but a positive command. For what purpose is he to make this statement? Why, in order that the Probate Court can determine whether it is necessary to sell any part of the realty. The Probate Court cannot assume jurisdiction so far as to order a sale of the realty, unless it is shown by the petition that the personalty is insufficient to pay the debts of the estate. The fact that the personalty is insufficient, is the fact that gives jurisdiction to proceed against the realty. If this fact does not appear, how is a probate court to acquire jurisdiction? Not by an assumption of it, in violation of the statute requirements. If this is so, then there is no use of any statute, but all you have to do is to elect a probate judge, and let him in his discretion dispose of all the estates that come under his notice, and thus get rid of useless statute provisions. If the decision of the court upon this question, is correct, then the judge can disregard one provision of the law, and if one, why not another, and why not *fril* the statute all away, and act as a court of conscience?

The rule by which we are to determine whether a court is to be judge of its own jurisdiction, is this: All courts which are not required to place upon their records, all the facts which are essential to the exercise of a power, but whose adjudications and records are presumed to be correct, can determine their own jurisdiction. On the other hand, all courts acting under a special statute, who are required

to place all the facts, essential to the exercise of a power, upon their records, are not competent to pass upon the question of their own jurisdiction; but this question is determined by an inspection of their record, and if this record does not show a compliance with the statute requirements in every particular, their acts are *coram non judice*, and absolutely void.

Of this latter class are the probate courts, and nothing can be presumed in their favor. Their record must show that the facts existed, which would give them jurisdiction. It must be shown, not by the conclusion at which they arrive from a hearing of the petition alone, but from the petition itself. If the petition does not contain the statute requisites, then no adjudication upon that petition—no matter how full, or how distinctly it is spread upon the records—can give jurisdiction; neither is it the fact that a petition is filed, which gives jurisdiction, but the fact that the proper matter is contained in that petition. The case cited by the court in their opinion, from 15 Ohio, goes no farther. The language in that case is: "The filing the proper affidavit, &c., gives jurisdiction." Suppose that the affidavit had omitted to state one of the essential facts necessary to authorize the issue of an attachment, would the court still have had jurisdiction so far as to bind the property attached? Certainly not; for the reason, that the issue of an attachment, is an independent summary proceeding—a proceeding which can only be exercised in the mode prescribed by statute; and any attempt to omit any one of the requirements of the statute, would render all acts void; for the reason, that a court exercising this power in any other mode, would destroy its validity. No court could cure a defective affidavit, by entering upon its records that the proper affidavit had been filed, when the affidavit itself showed the defect. The contents of the affidavit is one of the things that must appear in order to render the attachment valid. The reason is obvious. It is a summary proceeding, and cannot be performed in any other manner; and while a judgment recovered against a person upon constructive notice, is voidable only, for the

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reason that it is in the ordinary course of procedure of courts of general jurisdiction—yet an attachment irregularly issued, or issued upon an improper affidavit, in the same case, would be absolutely void, for the reasons above stated.

The case of *Grignon's Lessee v. Astor*, cited by the court, is of a character similar to our probate courts. Yet the county court in that case acquired jurisdiction by the filing of the petition, (which in this case contained the proper matter,) and by the certificate of the judge of probate. This case does not warrant the conclusion that because a petition was filed, no matter how irregular, the county court had jurisdiction. The test of jurisdiction in this case is, was the petition such an one that on a demurrer, judgment would have been rendered for the petitioner?

By reference to the statement made of the contents of the petition, it will be seen that it contained all the statute requisites—and it was this fact that gave jurisdiction. This petition contained the proper matter, and the certificate of the probate judge, gave the county court jurisdiction, and having thus acquired jurisdiction, its records, so far as its own acts are concerned, import *absolute verity*, and cannot be questioned collaterally. The law conferred no power upon the county court in this case to render any other judgment than that defined by statute. It could adjudicate no case except the case made by the presentation of the proper matter. Any acts of this county court, without this proper matter upon which to base its proceeding, would be void, and could pass no title to real estate. The line of distinction between the county courts of the territory of Michigan and the Probate Court of the territory of Iowa, is this: In the former, the court was not required by the statute to record the facts giving it jurisdiction, whilst in the latter, all its acts and doings must be recorded.

In the case above cited by the court, (2 Howard, 441,) the court says: "The true line of distinction, between courts whose decisions are conclusive, if not removed to an appellate court, and those whose proceedings are nullities, if their jurisdiction does not appear upon their face, is this: A court

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which is competent by its constitution, to decide on its own jurisdiction, without setting forth in these proceedings the facts and evidence on which it is rendered—whose record is absolute verity, not to be impugned by averment or proof to the contrary—is of the first description; there can be no judicial inspection behind the judgment, save by appellate powers. A court which is so constituted that its judgments can be looked through for the facts and evidence necessary to sustain it—whose decision is not evidence of itself to show jurisdiction and its lawful exercise—is of the latter description; every requisite for either must appear on the face of their proceedings, or they are nullities.”

If our probate courts are of this latter description, (and of this, I have no doubt,) then the petition filed by the administrator, not being as prescribed by statute, the Probate Court did not get jurisdiction, and all subsequent acts, under its orders, are void, and may be so declared in a collateral proceeding. The court, in its opinion, has said that a defective petition can only be reviewed upon appeal, &c. The reasons given by the court for this mode of review, and this only, can have no weight, if my position is correct. It does not follow that because the proceeding of probate courts and administrators, concerning the sale of real estate, can be questioned collaterally, that “questions would be interminable.”

This class of cases is as distinct from cases adjudicated by courts of general, superior, or inferior jurisdiction, as day from night. No courts except those made appellate courts, could try appeals or review matters on error. Justices of the peace would not possess this power, for the reason that they, being courts of general jurisdiction to a certain amount, or inferior courts of common law jurisdiction, it is not necessary that their records shall contain the facts upon which they decide, except when their proceedings are summary under statutory powers; consequently, their adjudications are just as binding until reversed, as the proceedings of courts of general common law and chancery jurisdiction. But in all cases in which any court of any character, acts

under a positive statutory power, that power must be strictly pursued, or their acts may be collaterally impeached. This rule will not render judgments uncertain, nor create confusion. If, on the other hand, the position assumed by the court is to be law, then statutory provisions are mere nullities, and may be regarded, or not, with impunity; and statute law, instead of being what it was intended to be, a certain fixed rule of action, affecting all alike, becomes a means in the hands of ignorant and dishonest persons, of taking from the infant heirs of a deceased person all they possess, in a summary proceeding, with only constructive notice.

I shall present nothing farther upon the question of the sufficiency of the notice to those interested in the estate, only to re-affirm the position assumed, that it is absurd, and in no important particular, complies with the requirements of the statute, and those interested in the estate, are in the same position they would be if no notice had been issued. For additional authorities upon statutory powers, see the following cases: 11 Ills. 637; *Blackwell on Tax Titles*, 51, 52, 53, 54, 55, 56, 72 to 74, 119, 120, 121; 2 Scam. 23; 4 Hill, 86; 1 Scam. 323; 13 Mass. 453; 11 Ills. 642; 1 Pick. 482; 22 Pick. 387; 2 Ohio, 231; 4 Pet. 249; 16 Wend. 554; 14 Pet. 322; 4 Hill, 96; 1 Barb. 343; 20 Wend. 249; 11 How. 414; 1 Hill, 100. I would crave the particular attention of the court to the case of *Williamson et al. v. Perry*, 8 How. 495, 540, 650; 3 Dal. 7; 1 Pet. 828; 15 Pet. 699; 3 How. 750; 6 Hill, 415; 9 Conn. 227.

Secondly. Admitting, for the sake of the argument, that there is no defect in the proceedings, up to the time that the administrator was licensed to sell, still his sale was void, for reason that he did not comply with the order of the court, as set forth in his license to sell. And here permit me to say, without intending any disrespect to the opinion of the court, that in that opinion, as written, the court has mistaken either the law or the facts of the case. The administrator's power to sell is a special statutory power, and can only be executed in the mode prescribed by the statute, and no

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other mode will pass any title to a purchaser. No adjudication by any court, affirming a sale made under a statutory power, can cure a defective sale made under that power. I state this proposition, and will sustain it by the adjudicated cases of the courts of different states, and of the United States, and defy contradiction from any reported cases, viz: That a sale made under and by virtue of a statutory power, if not made in the exact mode prescribed by the statute, is absolutely void, and even after it has been affirmed by a court of competent jurisdiction to order and direct the sale, may be impeached collaterally. Why? Because the administrator has no power to act in any other mode, nor has the court any power to supply any omissions in the proceedings of the administrator. If the Probate Court, by its adjudications and affirmations of a sale made under a defective notice, can supply that defect by such adjudication, and thus render an invalid sale valid, then why is it necessary to have any statute at all?—or why regard the requirements of the statute? The sale is valid if made as prescribed by statute, for reason that he has complied with its requirements; and it is valid if he has not complied with them, by virtue of the affirmation of the court; and in either case, those claiming adversely are concluded by the sale. All that would be necessary to pass the title, would be to make a sale, no matter how irregular. Only get a deed from the administrator and an affirmation by the court, and the title is perfect.

The statute requires that the administrator shall give thirty days' notice, by posting, &c., or the court granting the license "may order such notice to be published three weeks successively in any newspaper, instead of such posting up of notifications, and the executor or administrator, shall publish the same accordingly." Rev. Stat. 708, § 13. This is a positive requirement of the statute. "The administrator shall publish the same accordingly." There is no discretion with him—he must do this act in the exact mode prescribed by statute. In this case, it is conceded that the notice of sale was dated on the 31st of July; that the first

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publication was on that day, the second on the 7th of August, and the third on the 14th of August; and that the sale was on the 15th of August—thus giving but fifteen days' notice of the time of sale. The record shows that the order of court, as expressed in the license to sell, required him to give twenty-one days' notice of the time and place of sale, by publishing three weeks, &c. Then the order required three full weeks, the law required the same time, and he must give three full weeks' notice, before he could legally sell. Any sale made by him upon a shorter notice than required by the order of the court and the statute, is void, and no subsequent act of the administrator or the court, can make it binding upon those claiming under the decedent. For authority upon this point, see *Williamson et al. v. Perry*, 8 How. 536, 538, 542, 543, 544, 546, 547, 548, 549. On page 544, the court says: "No departure from the manner in which the sale is directed to be made, either under a judgment at law, or a decree in equity, is permitted." On page 548: "Looking to the conveyance, it is void for want of the performance of that condition precedent, which was made essential, not merely to the commencement of the estate, but to the very creation of the power of sale. See also, C. & H.'s Notes to Phillipps on Ev., 946, 987, 988, 989, 1016, 1289; 6 Wheat. 49; 6 Mass. 40; 14 Mass. 286; 10 Wend. These authorities are offered to show that the administrator must act as directed by statute; for he has no authority or power for acting in any other manner. See also 4 Wheat. 77; 6 Wheat. 199; 3 Denio, 555; 14 Mass. 222; 15 Ills. 386; 15 John. 537; 15 Wend. 374; 10 Ohio, 139, 278; 1 Mass. 254; 15 Mass. 329; 17 Mass. 162, 201; 7 Wheat. 59, 115; 7 Pick. 554; 16 How. 317. To the last case cited, I would ask the particular attention of the court. The only question in this case, was whether a notice of sale for taxes, was regularly advertised, and the sale regularly made, if it was sold before the expiration of twelve full weeks—the time prescribed by statute. The court held that the term "twelve successive weeks," is as definite a designation of time, according to our division of it, as can be made. When we

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say a thing may be done in twelve weeks, or that it shall not be done for twelve weeks, after the happening of a fact which shall precede it, we mean that it may be done in twelve weeks, or eighty-four days; or as the case may be, that it shall not be done before."

If the authorities above cited and quoted, are law, then is the notice, given by the administrator, of the time and place of sale, defective, and consequently, his sale is void. No adjudication upon this sale, or affirmation of it, can make it valid, for reason that this special court, although it may have jurisdiction of the case, so far as to order the sale, yet the affirmation of the sale is a subsequent act, independent of the granting of license; and before the court could take jurisdiction of this fact, it must find that the notice was given as prescribed; if not so given, it could no more legally affirm the sale, than it could grant a license to sell without a petition. This power to affirm, where it exists, exists by virtue of the statute, being a special statutory power. The facts, upon which the affirmation of the sale is based, must appear of record; a statement made by the administrator, that he had observed the requirements of the law, will not warrant an affirmation of the sale. The notice itself, must be placed of record, and then if defective, notwithstanding the court may have affirmed, the sale would not be valid, for reason that the facts did not warrant the conclusions of the court. See the case cited above from 8 Howard.

This, I apprehend, is the true rule of distinction, between courts of general and limited jurisdiction on the one hand, and those acting under a special power, on the other, viz: Those of the first class, when they acquire jurisdiction, can proceed to final judgment, and these judgments, until reversed, will be binding upon all persons, regardless of irregularities; while those courts who act under a statutory power, must show affirmatively by their records, that they have complied with the requirements of the statute, in every particular, or their proceedings may be impeached collaterally. The same rule marks the line of distinction between

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sales made by sheriffs, and other ministerial officers acting as such, and those made by persons acting under a special power. The former act by virtue of precepts issued upon judgments *prima facie* right, and their sales conclude third persons, notwithstanding their proceedings are irregular; for reason that the power under which they act, is general, whilst the latter, acting under a special power, conferred for a special purpose, must strictly comply with the statute requisites, for reason that nothing is presumed in their favor; and if the record does not show a compliance with the statute on their part, their sale will be void.

The notice of sale not having been given as prescribed by statute, the next inquiry is, is there any provision made by statute, for curing the defect? I claim that there is none. No court has power, under the statute, to affirm the sale, nor does the statute require that it should be affirmed. An affirmance by the Probate Court, of a sale made by an administrator, is void of power, being made without authority of law. The last act concerning the sale of real estate of intestates, by administrators, requiring adjudication under the statute, is to ascertain whether the facts exist which warrant a sale. If the court is of opinion that they do exist, it grants the license; and here all adjudication ends. All that the probate judge can do, after the license is issued to the administrator, is to receive, file and record the copy of notice, and proof of the manner of giving it, with the facts of sale, &c.; but he has no power to affirm the sale, or to disaffirm it, and if he does either, his acts are beyond his power, and void.

On page 708 Revised Statutes, (§ 10,) we find in what manner title is to pass to a purchaser. It reads as follows, viz: "If the facts set forth in the petition, shall be proved to the satisfaction of the court, and no sufficient cause be shown to the contrary, the court shall grant the license, and the executor or administrator shall be thereupon authorized to execute, in due form of law, conveyances of such real estate as he shall sell, which conveyances shall be effectual to pass to the purchaser, all the estate, right, title, and interest

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in the granted premises, which the testator or intestate had therein at the time of his decease, or which was then in any way chargeable, with the payment of his debts."

I think that this section, shows the necessity of a strict compliance with the law, not only on the part of the administrator, but the court also. The acts of the two seem to blend somewhat in this section. The court grants the license upon an inspection of the matters contained in the petition. Here let me ask, if the courts can inspect the matters contained in the petition, and by that act acquire jurisdiction, when that petition does not contain what the statute says it shall contain? Is a petition not in conformity with the statute, such a petition as the court could act upon, when the facts which it should contain, are omitted? But as I have presented this point at length in a former part of this argument, I will now leave it, and return to the question of notice.

The court will perceive that it is the sale made in accordance with the requirements of the statute, that gives validity to the deed, and not the confirmation of the sale by the court. As the power to sell, is one derived entirely from the statute, will a notice, published less than three successive weeks, stating the time and place of sale, be such a compliance with the statute, as to vest in the purchaser an absolute title? Is not the purchaser bound to know the law, and to know that the administrator has complied with it? The Probate Court is required to keep a record, containing all its own decisions, and copies of all petitions, notices, warrants, &c. The purchaser is bound to know that the law has been strictly complied with, and he cannot be protected in his purchase, if he is ignorant of what he might know, and what the law presumes every man does know. The court will recollect, that this is a proceeding *in rem*; that there are no adversary parties; that nothing but a constructive notice was given to those interested; that there was no appearance for the minor heirs; and that the power of transferring the title, is left by the statute, in the hands of one who has no personal interest at stake, and acts independently

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of all restraint, except that imposed by the statute. Then, to say that he can disregard the requirements of statute, is to say that he possesses greater power than his creator; all that would be necessary to absorb the estate, and rob the heirs, is to obtain license to sell, and then do as he pleases. This is not the law, and I hope it never will be. I hope this court will administer the law in the manner contemplated by its framers, and as it has always been administered, under similar laws in other states. If a different rule is adopted, then is the estate of a deceased person, lawful plunder for all who, under pretence of legal process, can seize upon it; and better would it be, for men to leave no estates to be settled after their death.

Not only must the administrator give the notice in the mode prescribed, and for the length of time prescribed, but these facts must appear of record. Not the conclusion of the Probate Court, as to whether the proper notice has been given, but "an affidavit of the executor or administrator, or of the person employed by him to give such notice, being made before the judge of probate, or before some justice of the peace, and filed and recorded, together with a copy of the notice, in the probate office, within one year after the sale, shall be admitted as evidence of the time, place and manner of giving the notice." Rev. Stat. 709, § 14. Thus it is seen what must be done after the sale by the administrator, and clearly the law does not contemplate an affirmation of the sale by the Probate Court.

It is not pretended, that there is any evidence of the notice, placed of record; nor is there any evidence of any kind, to show a legal notice. True, there is a copy of notice taken from an old file of the papers, giving notice of the sale; but it is not pretended, that this notice was given more than fifteen days; and how a court can for a moment, allow that it admits of a question, that such a notice is not a compliance with the statute, is a matter of surprise to me. If the court assumes the province of the legislature, and makes its decisions a healing act to cure the defective proceedings of the administrator, perhaps it can legalize the

sale; but in no other way can it cure the defect. If the statute means what it says, then is the sale made by the administrator, of the premises in dispute in this case, absolutely void.

I have thus far treated this case as though it stood independently of any other statute restriction than those already cited; and have tried to demonstrate, from the facts in the case—from the statutes, and from the decisions uniformly made in other courts upon like questions—that the whole proceeding in this case, is a nullity, for reason that there was not a compliance with the statute. I now wish to apply the test fixed by statute in this case, and in all like cases. Section 36, on page 713, Revised Statutes, reads as follows: "In case of an action relating to any estate sold by an executor, administrator, or guardian, in which an heir, or other person claiming under the deceased, or in which the ward, or any other person claiming under him, shall contest the validity of the sale, it shall not be avoided on account of any irregularity in the proceedings, provided it shall appear:

"*First.* That the executor, administrator, or guardian, was licensed to make the sale by a court of competent jurisdiction.

"*Second.* That he gave bond, &c.

"*Third.* That he took the oath prescribed in this statute.

"*Fourth.* That he gave notice of the time and place of sale, as prescribed herein; and,

"*Fifth.* That the premises were sold accordingly, by public auction, and are held by one who purchased them in good faith."

The court has said, that if the above provisions are not complied with, the sale may be questioned. See *Cooper v. Sunderland*, 3 Iowa, 114. In the same case, a sale made by guardian, was held void, for reason that it did not appear that the guardian took the oath, as prescribed in the chapter from which the last quotation is made.

Now, if this section thirty-six means what it says, it means that any person claiming under the intestate, will not be precluded by any sale made by an administrator, unless he

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has complied with the statute requirements. It must appear that he was licensed by a court of competent jurisdiction; not by a court who has jurisdiction under the statute to order sales of the estates of deceased persons generally; but, that in the particular case, he possessed competent jurisdiction, by the presentation, on the part of the administrator, of a petition; not a paper that the administrator calls a petition, but a petition containing the proper matter.

This proper matter must be just what the statute prescribes, and nothing less will comply with this section of the statute. Nor can a probate court acquire competent jurisdiction, unless the notice is given to those interested, of the time and place of hearing the petition. This notice must be as prescribed by statute, or the court is not one of competent jurisdiction. If these facts of a petition and notice containing the proper matter, do not appear of record, the court is not one of competent jurisdiction. It cannot give itself jurisdiction by its adjudication, and therefore its order allowing the sale, and its giving the license to the administrator to sell, are void; and the validity of the sale may be inquired into in a collateral proceeding, and the sale may be declared void. This section provides, that the sale shall not be questioned, if he gave notice of the time and place of sale, as prescribed in chapter 10 of this act. Rev. Stat. 706.

The fact of the notice having been published as prescribed, must appear. How? By an inspection of the records of the Probate Court, not by its adjudications; for the reason, that when it has issued the license to sell, it has performed its last act of adjudication—its power is spent—and all its subsequent acts are only those necessary to make and preserve a record of its own proceedings, and those of the administrator. If the notice is not given as prescribed by statute, the administrator has no authority to sell, and his sale can pass no title. Those interested in the estate have the right to give bonds for the payment of the debts of the estate, and thus prevent a sale; and for this reason, the notice must be published the full time. They are entitled to the full twenty-one days, to the last hour of the last day, and

to the last minute of the last hour ; and the administrator cannot, by carelessness, ignorance, or design, abridge that time ; and whenever it is shown by the record, or *aliunde*, that the notice has not been published the full time required, the sale is void, and may be so declared on a collateral proceeding. In what manner must the fact of the jurisdiction of the court, and the fact that the requisite notice was given, appear ? I answer, by the record, and in no other way can it legally appear. By a careful inspection of chapter 12, page 781, Revised Statutes, it will be seen that all the proceedings in cases before the Probate Court, must be recorded. Section 5, page 781, reads : " All his decrees and orders shall be made in writing, and the judge of probate shall record in books to be kept for that purpose, all such decrees and orders, and also all wills proved in court, with the probate thereof, all letters testamentary, and of the administration, all warrants, reports, returns, accounts, and bonds, and all such other acts and proceedings as ought to be recorded." This section, I apprehend, clearly establishes the fact that the Probate Court is one of special statutory power, not competent to pass upon the question of its own jurisdiction, but whose records must show the facts which give jurisdiction.

It also shows, that the record is the only proof admissible, of the time and place of sale. This must also " appear " of record. Let us take section 11, page 719, Revised Statutes, in connection with section 5, and there can be no doubt of this fact. Section 11 reads as follows : " When the validity of any decree of the Probate Court shall be drawn in question, in any other suit or proceedings, everything necessary to have been done or proved, in order to render the decree valid, and which might have been proved by parol evidence at the time of making the decree, and was not required to be recorded, shall, after twenty years from such time, be presumed to have been done or proved, unless the contrary appears on the same record."

By a careful examination of this section, it will be seen that no presumptions are to be made in favor of the records of the Probate Court ; that all their judicial acts, and the

facts upon which they are based, must be recorded, and that even after twenty years shall have passed away, and then only, can those presumptions be made in favor of those matters, not required to be spread upon the records. I submit whether a record not containing these statute requirements, "is absolute verity," or whether a court can "presume" anything in its favor; or whether a probate court, by placing its own conclusions upon record, can supply any defects which appear upon the face of its proceedings? Can a court say, that a notice not given the length of time prescribed by statute, is a good notice, because the administrator says that he gave notice according to law? If so, then presumptions are as good as facts, and everything omitted can be presumed. Will the statute warrant the court in presuming that by the term "three successive weeks," the legislature intended two "full weeks?" To my mind, this would seem unreasonable; and with deference to the opinion of the court, permit me to say that the language of the statute is too plain, to require, or even permit, a construction of this kind. When the statute says "three successive weeks," if it admits of a construction, or requires any presumptions in order to understand its meaning, I apprehend that the reasonable legal construction, or presumption, would be, to say it means "three weeks," and not two weeks. Nor does the fact that parties in adversary suits, must answer upon ten days' notice, weigh a particle in favor of this reasoning; because, after a party has his ten days' notice to appear and answer, he has right of appeal; and still, before his property can be sold, he is entitled to thirty days' notice of the time and place of sale; and this, too, in a case where he can at once test its legality, by motion to set it aside, and where he has the right to redeem.

In cases of sales by administrators, there are no adversary parties; there is no inspection of his proceedings after sale; there is no time in which the heirs can redeem—but by the act of selling, the estate is forever gone; and thus an infant, without a guardian, incompetent to protect its own interests, is stripped of all, and this, too, upon the presumption that

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"three successive weeks" means "two full weeks." It seems to me that this construction is not warranted; nor is any construction which is intended to aid a defective execution of a special statutory power. If, then, the notice is defective, what is the effect? I have shown that there is no court to adjudicate upon this sale, and consequently there can be no appeal. Is not this the only legal conclusion? The purchaser takes title at his own risk, and if the administrator has not complied with the requirements of law, the purchaser, and not the minor heirs, must take the consequences. Then I come to the conclusion that the sale is void, for the following reasons:

1. The Probate Court is a court of special statutory power, and can act in no other mode than that prescribed by statute; and nothing can be presumed in favor of its action.

2. The petition not containing the proper matter, and the notice given to the heirs not being as the statute prescribes, the decree of the court allowing the administrator to sell, was without authority of law, and void for want of jurisdiction.

3. The administrator not having given the notice of sale as prescribed by statute, had no power to sell.

4. The purchaser is bound to know that the statute has been complied with, before he purchases; and if it has not thus been complied with, he takes no title; and those claiming under the deceased, are not prejudiced by his purchase, and can maintain an action of right for the premises sold by the administrator.

In conclusion, permit me to say, that in this argument I have designed to present the law as I believe it is, and have assumed no position which is not supported by authorities entitled to consideration. If I have made myself understood, it is all that I desire. The importance of the case demands a careful investigation, which I have attempted to give to it: important, not for the amount in controversy in this suit alone, but for the reason that a large amount of real estate has passed from heirs of estates, upon proceedings of a like character, and for a nominal value; and, as a general

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thing, it has passed into the hands of men who get all they have by virtue of administrators' sales; men who look to no point, except to get by summary proceedings, and summary sales, the greatest amount of real estate, for the least money, and generally fatten on the substance of minor heirs; and who do not hesitate to take from them even their means of support and education, if it can be done under cover of legal procedure; and men who ought not, either in law or equity, to claim the benefit of presumptions. If the court shall decide that administrators must observe the requirements of the statute, in making sales of real estate, I shall feel assured that the rights of orphan children are safe. If, on the other hand, the court shall think that the stern rule of law will not allow them to declare this sale void, I shall bow with submission to that decision, but at the same time, shall feel, that of all persons, the orphan is most to be pitied in its helpless condition.

Richman & Brother, for the appellant.

We desire to offer some considerations to the court, and cite some authorities, in reply to the lengthy argument of the plaintiff's counsel. And in the first place, denying the proposition set forth in the outset of the plaintiff's argument, we shall proceed to give the *true doctrine of jurisdiction*, as applied to the case at bar.

The court, in *Homer v. Doe*, 1 Carter, 132, sets out the whole question of jurisdiction, under three distinct heads, and collates the authorities to sustain it. Referring the court particularly to that case, we will proceed to give the second head in full, it being the one with which we are most intimately concerned.

2. That a judgment of a court of any of the states of this Union, *having jurisdiction of the subject matter of the suit*, and of the *person*, however *irregular*, is *not void*, and *not impeachable collaterally*, unless it may be for fraud. *Rex v. Vincent*, 1 Strange, 481; *Rex v. Rhodes*, Ib. 703; *Raines' Case*, 1 Ld. Raym. 262; *Noel v. Wells*, 1 Lev. 235; *Bush v. Sheldon*, 1 Day's Cases, 170; *Peck v. Woodbridge*, 3 Ib. 80; *Kempe's*

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Lessee v. Kennedy et al., 5 Cranch, 173; *Burke v. Elliott*, 4 Iredell, 335; *Diehl v. Page*, 2 Greene, 143; *Martin's Lessee v. Roach*, 1 Harr. (N. J.) 477, 478; *Obert v. Hammill*, 3 Ib. 73; 3 Cowen & Hill's Notes to Philipps on Evidence, 803; *Ludlow's Heirs v. Johnson et al.*, 3 Ohio, 553; *Atkinson v. Jordan et al.*, 5 Ohio, 294; *Glover's Heirs v. Ruffin*, 6 Ohio, 255; *Pillsbury v. Dugan's Adm'r*, 9 Ohio, 117; *Stall v. McAlister*, 9 Ohio, 18; *Thompson v. Tolmie*, 2 Peters, 164; *Voorhees et al. v. Jackson*, 10 Peters, 449; *Grignon's Lessee v. Astor*, 2 Howard, 339. We think the foregoing statement of the law of jurisdiction, will aid us materially in the investigation of the case before the court.

Had the Probate Court, in this case, jurisdiction? It will not be denied that the *nature of the case* entitled the Probate Court to take cognizance of the *persons* and *subject matter*. They were peculiarly within the jurisdiction of such a tribunal; it was organized especially for the hearing of such causes. What is jurisdiction? "It is defined by the Supreme Court of the United States, to be the power to hear and determine a cause." 6 Peters, 709. Now what was necessary to bring a case before the Probate Court, so that it could *exercise* the jurisdiction conferred upon it by law? Rev. Stat. 136. Simply the presentation of a petition, setting forth certain facts mentioned in the statute. Of the *sufficiency* of that petition, the court was to *judge* and *decide*; for, "all matters of law and fact, shall be determined by said court, when properly before it," says the statute, (page 136, section 4), and if the decision should be erroneous, a full and adequate remedy was provided by the statute organizing probate courts; for, after using the language just quoted, it goes on to say, "and in all cases, an appeal or writ of error shall lie to the District Court of the county." In further support of the doctrine advanced, we desire to direct the attention of the court to the reasoning of SMITH, J., in *Doe v. Smith*, 1 Carter, 457. This was an ejectment, to declare void the proceedings of a probate court, in partitioning certain lands. He first establishes the fact that the Probate Court is one of general jurisdiction, (page

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456;) and being satisfied that the case before it came within the general scope of its powers, proceeds to inquire what was necessary to bring a case presented within the operation of such jurisdiction, and says: "The first step to be taken was, obviously, the application. The statute does not prescribe the mode in which the application should be made, but it was made in the present instance by petition; and upon such application being made, it became the duty of the court to ascertain: 1st. Whether the facts therein alleged were substantially such as to authorize the remedy petitioned for. 2d. Whether the requisite notice had been given to the other owners. 3d. Whether the facts alleged were stated with sufficient form and precision. 4th. Whether the statements contained in the petition were true. If the first inquiry were answered satisfactorily—that is, if sufficient facts were alleged to bring the case presented, within the jurisdiction of the court—such jurisdiction at once attached; and the remaining subjects of inquiry, became the subjects of judicial action, but were not questions necessarily incident to the exercise of jurisdiction. Jurisdiction must necessarily exist, before such questions can be examined. In this case, the petition filed by Kendrick avers that he, together with other persons named, were the owners of several tracts of real estate, situated in a certain congressional township and range, and that he desired to have partition thereof. This, (says the court,) we think was sufficient to satisfy the first subject of inquiry noticed above, (viz: the application,) and to authorize the entertainment of jurisdiction in the case."

The court will perceive that this was a case before a probate court, and a proceeding *in rem*; yet we find the court deciding the question of its own jurisdiction, upon the presentation of a petition, even though the statute did not prescribe the mode of application. The court decided, first, that a petition was the proper mode; and second, that the petition presented contained the proper matter, &c.; and these proceedings, says SMITH, J., could not be collaterally impeached. The petition was defective; it did not mention

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the state or county in which the land was situated; one tract was mis-described; and five other distinct objections were made to the proceedings; but the court overruled them all, and on page 459, says: "Having thus arrived at the conclusion that the Probate Court had jurisdiction, &c., &c., the remaining objections may be easily disposed of. The sufficiency of the report of the commissioners, the proof of the title of the petitioner, and the ascertainment of the relative shares of the several parties, were all matters of subsequent adjudication, and the decisions of the court thereupon, cannot be controverted collaterally."

It is admitted in plaintiff's argument, that the judgments of courts of general jurisdiction, are not impeachable collaterally; while those of inferior and special jurisdiction, are. We have already shown, in *Doe v. Smith*, that a probate court was there regarded and treated as a court of general jurisdiction; and we now call the attention of the court to the opinion of CATON, J., in *Propst v. Meadows*, 13 Illinois, 168. He says: "The county court, although of limited, is not, strictly speaking, of inferior jurisdiction, and certainly is not a court of special jurisdiction. It is a court of record, and has a general jurisdiction of unlimited extent, over a particular class of subjects; and when acting within that sphere, its jurisdiction is as general as that of the Circuit Court. When, therefore, it is adjudicating upon the administration of estates over which it has a general jurisdiction, as liberal intendment will be granted in its favor, as would be extended to the proceedings of the Circuit Court; and it is not necessary that all the facts and circumstances which justify its action, should affirmatively appear upon the face of its proceedings."

In the *Lessee of Adams v. Jefferies*, 12 Ohio, 272, the court observes: "It is necessary that such tribunals (probate courts) show they act within the scope of their powers; but after jurisdiction is once acquired, however irregular or erroneous their proceedings may be, they cannot be *collaterally* impeached, and they concluded all persons, unless annulled by *certiorari* or appeal." And see cases there cited.

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In *Lessee of Ewing v. Higby*, 6-7 Ohio, 842, the court observes: "An order of the Court of Common Pleas to sell the land descended to the heirs, on the petition of the administrator, is the order of a court having jurisdiction of the subject, and is as conclusive on all interested in the land, as a judgment or decree. A purchaser under such order holds his title as securely as a purchaser at sheriff's sale. To defeat his title, the order can no more be attacked *collaterally*, than can a judgment or decree; and, although it may be erroneous or irregular, a title acquired under it by a stranger, before it is reversed or set aside, is as good as though it were not erroneous or irregular." 3 Ohio, 257; 4 Ib. 181; 2 Peters, 163; 2 Binn. 46. In *Heirs of Ludlow v. Johnson et al.*, 3 Hammond, 553, the court says: "If the Court of Common Pleas, acting as a probate or orphans' court, had jurisdiction, an end is put to the matter. We cannot inquire *collaterally*, whether that jurisdiction was properly exercised. The order may have been unadvisedly or erroneously made, but the purchaser has innocently acquired rights, of which he cannot be divested, so long as it remains unreversed." In *Thompson v. Doe*, 8 Blackf. 337, the court authorized the administrator to sell land at *private sale*, contrary to the statute, and it was held that the order of sale was erroneous, but that it was *not a nullity*, and the purchase under it *was valid*. See also, 15 Ohio, 689; 18 Ohio, 368; 5 Blackf. 487, on this subject.

We also think that section 10, chapter 10, page 708, Rev. Stat., shows clearly that after jurisdiction had once attached, the court had power to determine upon all points that might arise, and that its decisions could not be *collaterally* inquired into, but only in the manner provided by the statute, (page 136, § 4;) for it expressly says, "If the facts set forth in the petition, shall be proved to the *satisfaction of the court*, and if no sufficient cause be shown to the contrary, the court shall grant the license, and the executor or administrator shall be thereupon authorized to execute in due form of law, conveyances of such real estate as he shall sell, which conveyances shall be effectual to pass to the

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purchaser all the estate, right, title and interest in the granted premises, which the testator or intestate had therein at the time of his decease." Thus declaring, in effect, that if the court is satisfied, upon due inspection, it shall grant a license to sell; by which authority, the administrator conveys to the purchaser all the decedent's interest; and such a proceeding, in the nature of things, must be binding, until set aside or reversed in the statutory manner.

The plaintiff's counsel briefly refers to the case of *Grignon's Lessee v. Astor*, 2 Howard, 320, and says that the petition in this case contained "the proper matter," and therefore conferred jurisdiction. But the case shows nothing of the kind. It distinctly says, that the jurisdiction was conferred by the presentation of a petition, and that the decision of the court as to its sufficiency, was the exercise of jurisdiction. See page 839. But the court went still further, and held, that "the granting of the license was a binding adjudication; that all facts necessary to give jurisdiction, as well as to warrant the license, existed; and that the record was conclusive evidence thereof." This whole case maps out the law which governs cases like that under consideration, in a clear and luminous manner; and we see nothing in the argument of plaintiff's counsel, or the array of cases therein cited, to weaken its force. It is evidently a formidable obstacle in the learned counsel's way, and he hastily passes it by, pausing but a moment to misstate a few of its points. The court will observe that in the case referred to, principles are not only enunciated, but they are supported by numerous unquestionable authorities, and a train of masterly and comprehensive reasoning, which, we think, must forever set this subject at rest.

Plaintiff's counsel has cited a great many cases, apparently in support of his positions; but do they sustain him? Let us examine a few of them. He relies strongly on 6 Wheaton, 119; but an attentive perusal of this case shows, that the court never had jurisdiction. See page 125. He makes a great parade of *Williamson v. Berry*, 8 Howard, 537, and onward. But there are several things to be noticed

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in this case. This was a sale by a trustee, of certain premises, under a private act of the legislature of the state of New York, passed to remove obstacles in the way of executing certain trusts under a will; and it was held he had only a special power, and that if he exceeded the power, his acts were void. But in this case, the court admitted that if the chancellor had jurisdiction, his proceedings could not be collaterally impeached. But they denied his jurisdiction to do certain things, and on that ground declared his order, &c., void. We would respectfully, but earnestly, direct the attention of the court to the dissenting opinion in this case. Page 550. The private act, (which was passed for the relief of one Thomas B. Clarke,) is recited in the report of the case; and a perusal of it will show that there can be but little analogy between the acts of a trustee under it, and the acts of a probate court, or the acts of an administrator, whose doings are duly confirmed by the court appointing him. But even in that case, the court were divided. TANEY, J., CATRON, J., and NELSON, J., dissented; and the latter delivered a powerful opinion, overturning, as we think, the decision of the other judges. He (plaintiff's counsel) cites *Young et al. v. Lorain et al.*, 11 Illinois, 625, but why he did so, it would be difficult to tell, unless for our benefit. This was a guardian's sale of the land of his wards. The petition did not comply with the statute; there were irregularities all the way through; yet the court sustained the proceedings of the probate and circuit courts. But the guardian's deed gave a defective description of persons and premises; and the wards having afterwards obtained a patent for the land, the court held that this new title did not enure to the benefit of the guardian's grantees, and that they were not estopped from setting up this new title. In this case, the court said: "Was the aid of the court properly invoked? If so, then the court acted within its jurisdiction, and every presumption is in favor of its judgment. Indeed, nothing can be alleged against it in a collateral proceeding." We should like to know, in the light of a careful perusal of this case, what becomes of the authority of *Smith v. Hielman*, so

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strongly relied on in plaintiff's argument. We think the new case overrules the old one.

Plaintiff's counsel cite many other cases; but a careful consideration of them, will show that they all, or nearly all, support the great principle underlying this whole class of questions, viz: that if the court have jurisdiction, its proceedings are *coram judice*, and cannot be collaterally questioned. CATON, J., declares the whole doctrine in his clear and lucid opinion, in the case last referred to, (11 Ill. 637,) and clearly establishes all for which we have contended.

There is an attempt, in plaintiff's argument, to lug in decisions upon tax titles in support of his cause; but we think they clearly rest on a different principle. The gross inadequacy of the sums paid for these titles, is the chief reason for viewing them with great strictness. Lands at tax sales, are given away, almost literally, and such titles should be scanned closely. See Blackwell on Tax Titles, 67, 68. But Blackwell does not put administrators' sales on a level with tax sales; he merely uses the former for illustrations—points out the similarities existing, and says that strictness must be observed in both classes of cases—which might readily be admitted. But what has this, or the counsel's learning on the subject of statutory powers, to do with overturning the proceedings of a court of general jurisdiction, in a collateral proceeding? The citation from Blackwell, on page 3 of the plaintiff's argument, with regard to reviewing a decision collaterally, applies only to "an inferior tribunal of limited jurisdiction." But the Probate Court is not such a tribunal; over a particular class of subjects, it has a general jurisdiction of unlimited extent. 13 Illinois, 169; 2 Howard, 319. What, then, becomes of the counsel's argument?

We now come to that portion of plaintiff's argument which treats of the administrator's notice of sale; and this question, we think, is swallowed up in that of jurisdiction. It is a matter with which we have nothing to do; it has been once adjudicated by a court of competent jurisdiction, and declared to be in compliance with the statute. The Probate Court had only to be "satisfied" of the sufficiency

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of the administrator's notice of sale, in the same manner as it was satisfied that the facts set forth in the petition were proved. Rev. Stat. 708, § 4. Jurisdiction had then attached, and however irregular any subsequent decisions on any points arising, might be, they were only the subject of a remedy provided by the statute, creating the tribunal itself, to wit: by writ of error or appeal. Rev. Stat. 186, § 4. But as the learned counsel devotes a large space to the consideration of this subject, it will be well enough, perhaps, to examine his foundations, and the superstructure reared thereon. Were the simple question, whether the requisite notice of sale had been given, in this case, before the court directly and regularly, it might be deemed insufficient. But it is one of a series of acts, already passed upon, by a competent court, in the regular exercise of its jurisdiction—a court that had, in the language of the statute, full power "to determine all matters of law and fact properly before it;" and its decisions cannot be reviewed in a collateral action.

The case of *Early v. Doe*, 16 Howard, 615, has been referred to, to show the insufficiency of the notice of sale. But then, the single question whether the requisite notice of a sale of land for taxes, had been given, was the only issue; and the question was before the court regularly, by writ of error, (page 616,) and not collaterally; and the court decided the notice insufficient. Plaintiff's counsel craves "the particular attention of the court" to this case; yet it is not in point, and fails to support him. And now let us again recur to the case of *Young et al. v. Lorain et al.*, 11 Ill. 625, cited by the counsel in the former part of his argument, with approbation. In that case, the court held, "that all objections taken to the notices of sale, posting them, and other matters involved in the adjudication of the Circuit Court, either in granting the original order of sale, or in the final order confirming the report of the guardian, could avail nothing in a collateral action;" and on page 640, the court says: "The objection that the report of the guardian was not confirmed by the court, cannot be sustained; the order

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made upon the return, was a substantial and sufficient confirmation." In the case before the court, the sale was confirmed and pronounced in accordance with the statute, and we cannot go behind those proceedings in this action. If, then, as we have shown, cases to which the counsel calls "the particular attention" of the court, fail to sustain him; and if others directly contravene the doctrine he attempts to establish; his foundations are weak, and the superstructure of cases not particularly referred to, must totter and fall to the ground. But *Lessee of Payne v. Mooreland*, 15 Ohio, 435, settles this whole matter of notice; and we refer the court especially to that case. It was there held, in an attachment case, "that the court acquired jurisdiction by issuing of process, predicated upon the requisite affidavit, and the attaching of the property; and, if after thus obtaining jurisdiction, the court proceed to render judgment without the publication of notice, such judgment is not void, and cannot be impeached collaterally, but must be reversed upon writ of error."

The plaintiff's counsel, throughout his entire argument, fails to preserve the distinction between reviewing the proceedings of a court by writ of error or appeal, and collaterally; and does not perceive that the strictness he urges with regard to the action of probate courts, may be, and no doubt is, to a certain extent, true; it is even true of the Probate Court whose proceedings he is now endeavoring to overthrow. It was intended by the law makers, that the requisites of the statute should be fulfilled. But what if they were not? was the plaintiff without remedy? Certainly not. The remedy was full and adequate, and clearly pointed out, as we have already shown. The fact is, the counsel is engaged in a fruitless attempt to show certain proceedings to be absolutely void, when they were only voidable. He seems to think that "the fact that parties in adversary suits must answer upon ten days' notice, does not weigh a particle in favor of the reasoning of the court, as to the sufficiency of the notice of sale, because, after a party has his ten days' notice to appear and answer, he has his right

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of appeal!" But there was an appeal as well, from the Probate Court's decisions; and a party, in both cases, may suffer his remedy by lapse of time, to become useless to him. Upon recurring to the Revised Statutes, (page 720, from § 21 to § 30,) it will be found that very liberal, and indeed extraordinary provisions,*are made with regard to appeals from the Probate Court; allowing the appellant a whole year in which to take his appeal, if he shall have omitted to take the same according to law, without default on his part; and if without the United States at the time a decree was rendered, three months after his return. With this almost singular provision in plaintiff's favor, which was suffered to pass by unused, the counsel has the hardihood to come in at this late day, and ask the court to declare the proceedings of the Probate Court void, in a collateral action. And because of his negligence, are innocent purchasers, and their grantees, to be stripped of their property in a collateral action, to overturn the proceedings of a court of general jurisdiction, in a certain class of cases? We think not.

It will not be overlooked that the defendant in this case, is a second purchaser—that is, he is the grantee of the purchaser at the administrator's sale—and therefore stands on still better ground than his grantor would have done; for it has been distinctly held that such a sale may be voidable as to the first purchaser, yet valid as to the second. 6-7 Ohio, 490.

The plaintiff's counsel winds up his argument with a pathetic appeal in behalf of the rights of orphan children, about whose welfare he seems to entertain a peculiar solicitude. But we apprehend that if the hardship of the case has any weight in the final decision of this cause, it would be no difficult task to show that a different decision from the one already given, would work infinitely greater hardship; as he admits that "a large amount of real estate has passed from heirs of estates, upon proceedings of a like character;" and we might add, the same is now in the hands of innocent purchasers, or their grantees.

In the foregoing argument, we have attempted to deal

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rather with the principles of law by which this case must stand or fall, than to reply *seriatim*, to the arguments of plaintiff's counsel. For, if our positions be correct—if they are noted and grounded in the perfection of that reason denominated law—the tact and ingenuity of the learned counsel avail him nothing; and they must yield to the controlling power of fixed and immutable rules, founded upon the wisdom and policy of ages, and sanctioned by the universal experience of mankind. And we will conclude with the fitting remarks of HITCHCOCK, J., in *Heirs of Ludlow v. Johnson et al.*, 3 Hammond, 558: "While lands are sold for the payment of the debts of the deceased persons, every inducement should be held forth to encourage purchasers to give the full value of what they buy; and nothing can have a greater tendency to produce this effect, than to afford them, when they have purchased, a reasonable protection. There is no good reason why those who purchase from an administrator, should not be viewed with the same favorable eye, with those who purchase from sheriffs. In either case, it is proper that the order or judgment should remain final and conclusive, upon all parties concerned, until set aside, reversed, or annulled." To sum up the whole matter, from a review of the authorities, we arrive at the following conclusions: 1. The Probate Court had jurisdiction of the persons and subject matter. 2. It was a court of general jurisdiction; and, 3. That therefore its proceedings cannot be collaterally impeached.

WOODWARD, J.—In this cause, a rehearing was granted, upon the petition of the plaintiff and appellee. The granting a rehearing, in our present practice, does not import a reversal of the opinion of the court, as under the former and the common law course. It is, now, but a re-argument and reconsideration, on the petition of the party. When the court itself desires it, the cause is set down, technically for re-argument. In neither case, does it necessarily imply that the court is convinced that it has fallen into error. In the present cause, the rehearing was granted for several reasons.

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The questions are, in their nature, important, as bearing upon a large class of sales of real estate. The pressure of business rendered it necessary to make the former opinion of the court too brief, perhaps not entering into a detailed exposition of the questions, as may have been desirable for the sake of clearness. We announced the rules, but left their application to the facts, to be made by the mind of the reader. And further, the counsel seems to have misapprehended the thought and reasoning of the court, and to apply to one part of the cause, reasoning or ideas which were intended for another. This arises from the opinion being too general. We have been willing, therefore, to reconsider the cause—to look at it more in detail, and see if we have fallen into error.

The subject is a difficult one. The decisions are very numerous, but for the most part, do not stand on rule; at least, the rule they recognize, is so general, that it admits, within its ample range, almost any construction or application in details. The rule referred to is, that inferior jurisdictions and special authorities, must show their jurisdiction, and must pursue their authority strictly. It was not necessary for the petitioner to labor to cite a long train of authorities, to prove this proposition. It is stated in all the forms of which it is susceptible, in the various cases, and is repeated in a large number of them. The doctrine is admitted by all. Whether a court of probate is an inferior court, in the technical sense, is not a question altogether so well settled. It is so called in many cases, it is true, and probably the courts of New York have settled the question for that state. But the question is held otherwise by the courts of some states, and it is doubted by others. This, however, has not been made a point in the present cause. Leaving that troublesome question, we have assumed the court to be an inferior one, in the technical acceptance.

There is no difficulty in proving or in admitting the common rule in relation to inferior jurisdiction and special powers; the difficulty lies in the application of the rule to details. In reference to the exercise of a statutory power, we

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find various adjectives used ; such as "closely," "strictly," "rigidly," "exactly." These are used by counsel. They are used in the head notes of cases, and not unfrequently in the opinions of courts. Now, if they mean anything, it is that the authority is to be exercised literally ; and yet it is believed that not a case can be found, in which a court has said that such a power must be followed with literal exactness—that is, literally. The truth is, that the rule, stripped of this verbiage, and divested of expletives, is, that when a special authority or power is given, and the manner of its exercise is pointed out, the power or authority must be pursued in the manner dictated. It is probable that no court has ever held, that the slightest possible deviation is fatal, and yet this is the inevitable consequence, if the use of the above adjectives is authoritative. The only true rule of construction in this respect, and that which the courts have, sometimes in terms, and uniformly in practice, adopted, is that the power is to be exercised substantially in the manner prescribed. These ideas will be adverted to and illustrated hereafter, under the points made and the cases cited.

The argument derived from the supposed disregard for the interests of minor heirs, and the alleged sacrifice of their property, is undoubtedly entitled to its weight, but yet it does not afford much assistance towards forming a rule by which all cases are to be tried alike. It teaches, however, that a fair degree of strictness in the observance of the laws, should be required. But there is no security for any one, except in the tribunal which administers the law in the first instance. There has always appeared to be a degree of absurdity in requiring a notice, or other process, to be served on an infant child, the only use of which would be the bringing the knowledge home to the friends incidentally. These friends, too, seldom discover any advantage to the minor in setting the proceedings right, and in keeping them correct, so as to be binding ; but they complain of irregularities at a subsequent day, when circumstances have changed. And however true it may be, that speculators stand ready to purchase cheaply the property of minor heirs sold under the

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order of court, there is undoubtedly an equal truth on the other side, which charges a dullness which does not perceive the enormity of a technical error, until the property has greatly increased in value. Neither of these hostile views can have weight in forming a judicial opinion. But there is a thought well worthy of consideration, which is, whether the uncertainty of these sales by administrators and guardians, does not prevent the property selling at a fair rate; and whether upholding them would not promote the interests of the heirs and minors themselves. Why does not property sold for taxes, bring a respectable value? Every one knows that it is owing to the want of confidence in the title; and so it is measurably, in respect to these other sales. These remarks are not made as an argument on which a judge can sustain a sale, but as a tolerably fair answer to the usual complaints of those who seek to set them aside. It is but too true, that this class of persons have but little care taken of their interests, when it is greatly needed, and the law maker cannot exercise too much caution in preserving their rights; but it is possible for both the law maker and the judge to surround the proceedings with small technicalities, which are detrimental to all who are concerned.

Before taking up the matter of the case, one or two explanatory remarks should be made. The cases on the subject of these sales, are exceedingly numerous; and it is impossible, as well as useless, to attempt a review of all of them; but in this and the preceding examinations, all which were accessible have been examined; and all those cited by the plaintiff, have been seen, unless it be where there is a mis-reference, of which there are several; and in those instances, the case intended has probably been found. There may be instances where we shall have occasion to refer to cases which we have not seen; but this is done only upon the authority of other cases, or of proper books. This was remarked in the case of *Cooper v. Sunderland*, where many such were cited; but it was thought advisable to give the references, for the benefit of those who may have access to them; and if some of them are not to the point, the fault is

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in the authors from whom they are taken. It will not be necessary to refer to that very large class of cases, (many of which are cited by the plaintiff's counsel,) which relate to the general rule before stated, concerning courts of inferior and limited jurisdiction; or those which relate to special authorities; or those which teach that you may inquire into the jurisdiction of all courts, and those which lay it down as a fundamental rule, (but subject to some exceptions,) that a party who is to be deprived of his rights or property, is entitled to notice. These ideas are too well settled to require support. We shall assume that when the books say the requisite facts must appear, &c., and use similar expressions, the appearance may be by the record proper—the entries—or by the papers of the case on file, or, (generally,) by evidence. And when the books speak of facts appearing on the face of the record, or on the face of the proceedings, they often refer to a manner of doing business which has never existed with us. In the most, if not all, of the older states, a complete record is made in each cause; whilst with us, this is not done, even in our superior courts, but the files take the place of the greater part of the record proper.

We proceed now to examine the cause in detail, with reference to the objections made to the validity of the sale. The plaintiff shows title, and should recover, unless that title has been divested by the administrator's sale. From the nature and position of the cause, the objections to the sale were to be pointed out on the trial; and in the argument, there are no pleadings setting them forth. The reasons given why the sale is invalid, are the following:

1. That the administrator's petition for leave to sell the real estate, does not state the value of the personal property.

2. That no specific account of the debts due from the deceased, is filed with the petition.

3. That the publication of the notice of the sale, was insufficient.

4. (In the petition for a rehearing.) That the notice calling upon all persons interested, to show cause why a sale of the realty should not be ordered, was insufficient in itself.

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The first objection is, that the administrator's petition for leave to sell, does not state the value of the personal property. By statute, (1843, chap. 162, sub-chapter 10, 658,) it is provided, that when the goods and chattels of a deceased person are insufficient to pay all his debts, with the charges of administration, his administrator may sell the real estate, upon obtaining a license therefor. By section three of the act, it is provided that, "in order to obtain such license, the administrator shall present to the court, a petition setting forth the amount of the debts due from the deceased, as nearly as they can be ascertained, and the amount of the charges of administration, and the value of the personal estate," &c. And section nine provides that, "if the facts set forth in the petition, shall be proved to the satisfaction of the court, and if no sufficient cause be shown to the contrary, the court shall grant the license." That portion of the record, and the facts on which the questions arise, are given in the former opinion, the record being quoted literally. It will be perceived that the amount of the debts and administration charges, is given, and then it is alleged that the personal estate is insufficient to discharge that amount. The question is, whether this last allegation is sufficient. It is not literally what the statute calls for, but it is equivalent to saying that the personalty does not amount to so much as the debts and charges. A few cases will be referred to, which approach the point nearest, and these will be principally from New York, where the courts have probably gone farthest on these questions, and perhaps farther than sound reason dictates.

The case of *Corwin v. Denning*, 11 Wend. 648, was a suit for partition, in which the decree of partition was held void, for the reason that there had been no advertisement to bring in unknown owners, as was required by the statute. They were necessary parties. But in this case, (see 17 Wend. 483, and 21 Wend. 40,) by the statute of New York, an administrator petitioning to sell real estate, was required to file an account of the debts and of the personal estate. In *Ford v. Walsworth*, 15 Wend. 450, there was no such account filed, nor any substitute for it, and the order of sale was held in-

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valid, and of consequence, the sale also. The same case was again before the Court of Appeals, in 19 Wend. 334, where it was held, in express terms, that secondary evidence might be received to show that an account was filed, if it could not be found among the papers of the court. The case cites 12 Wend. 533. This case meets the observation before made, concerning the meaning of the word "appear."

In *Bloom v. Burdick*, 1 Hill, 139, the administrator did not file his inventory of the estate, until he filed his petition for leave to sell realty; and the court permitted the inventory to stand for the account called for by the statute. This is a departure from the strict requirement of the statute. But the court reason that the account was required, to show the present state of the property; and that if the inventory was made at that time, that is, at the time of filing the petition to sell, it answered the same purpose, and was sufficient to meet the demand of the statute. The idea of an equivalent or substitute, is adopted. *Corwin v. Merritt*, 3 Barb. 341, was a case of a sale by an executor, under the authority of the Surrogate's Court. The sale was held void, because no account of the property and debts of the deceased, was presented; and because there was no proof of any kind, of the publication of the order. We come now to *Atkins v. Kinnan*, 20 Wend. 241. The statute of New York required, that on a sale of real estate by the administrator, in the deed of conveyance, the surrogate's order should be set forth at large. The deed was held insufficient, for want of thus setting forth the order at large, at least, until rectified by an application to the chancellor, under the provisions of another statute. The court say: "We do not say it should be literally recited, but it is impossible to say that a document is set forth at large, unless every part of it is substantially presented." Here is an act—the copying of a paper—in its nature allowing, if not requiring, a greater degree of literalness than any other; and yet that court would not require a literal performance of it, but would hold a substantial one sufficient. This case contains other remarks bearing upon some of the points before us. The court say: "It is clear

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that we cannot, in this collateral proceeding, inquire whether, in fact, there were any debts due, over and above the personal estate." And, speaking of the difference between want of jurisdiction and error, the court proceed: "In the former case, the whole is *coram non judice* and void; in the latter, the proceeding cannot be impugned in a collateral action, even though it be erroneous on its face, and even though it relate to a fact, which in a former stage of the proceeding, might have been essential to confer jurisdiction;" citing *Betts v. Bagley*, 12 Pick. 582, which is quoted below. In this case, the court seem to come near to deciding on the sufficiency of the account presented. The question was, in fact, whether the paper was an account. It came near to being what our statute requires, that is, a statement of the amount of indebtedness, rather than an account of the debts. It contained three parts: 1. The amount of debts owing in New Jersey. 2. The amount owing in New York. And, 3. A specific liability to a certain person on a certain matter. The court sustained it on the last, and did not adjudicate the two former.

The plaintiff in the case at bar, makes particular reference to the case of *Corwin v. Merritt*; to *The Matter of Underwood*, 8 Cow. 59, in which a publication for six weeks, was held not to be a sufficient compliance with an order directing a notice of ten weeks; and to *Kennedy v. Greer*, 13 Ill. 482. The only matter in point in this last case, is the reiteration of the general proposition, concerning the conclusiveness of the judgment of courts of limited jurisdiction. The discussion is upon the character of the circuit courts of the state of Illinois. *Smith v. Hielman*, 1 Scam. 323, held that when the statute requires an order to be set out in full, it is not sufficient to set it out in substance. This is, so far, against *Atkins v. Kinnan*.

The case of *Young v. Loraine*, 11 Ill. 625, was an action for the recovery of land sold at a guardian's sale, and impeaching the former proceedings. The former guardian resigned, and a new one was appointed, by whom the land was sold; and it was doubted whether the first guardian

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could resign. The Supreme Court say: "Remember, the objection is made in a collateral proceeding, and not on appeal. In this collateral action, you cannot inquire into the sufficiency of the reasons for removing the guardian; the court had jurisdiction to remove." Objection was also made to the sufficiency of the petition in its allegations, and the court says: "It states all the statute requires, except that, instead of averring that, 'the guardian has faithfully applied all the personal estate,' &c., it states that no personal property of the ward had ever come to his hands. We do not think this departure from the expressions of the statute, fatal to the jurisdiction of the court, although it must be admitted that the averment is somewhat equivocal. The meaning of the statute is, that the guardian should have faithfully applied all the accessible personal estate; and we are disposed to hold that the averment here is equivalent to that." This is quite as strong a case, if not a stronger one, than that at bar. The case of *Ewing v. Higby*, 6-7 Ohio, 340, was on an administrator's sale. There was a question of minors having notice. The guardian of two appeared. "The court had the return of process served on Samuel and John, and the appearance of the guardian of the lessors, and acknowledgment by him, in open court, of notice of the petition. The court, when they made the order, must have determined that by serving process on Samuel and John, and by the appearance of the guardian of the others, the four heirs were parties to the petition, within the meaning of the act; and this was a matter of which they had jurisdiction. Indeed, they were compelled to determine this question. They could not get along without." Here was a question of the sufficiency of notice, service, and appearance, and whether persons were made parties; and the higher court held it a matter for the lower court to decide, and would not inquire into it collaterally. In *Paine v. Moreland*, 15 Ohio, 485, the doctrine is, that the court acquire jurisdiction in attachment, by the filing of the proper affidavit, the issuing of the writ, and the attachment of the property; and that if, after this, they render judgment without publication, it is

not void ; but that having acquired jurisdiction, it is not lost by a subsequent irregularity.

Now, taking the averment which the petition, in the case at bar, does make, and the finding of the court as to the necessity of the sale, we feel that we are justified by the cases, in holding that the averment of the petition, is an equivalent for the statute ; and that it was within the jurisdiction of the court to decide on the sufficiency of the petition. Other cases, also, and some hereafter cited, have a bearing upon, and support the same doctrine.

The second objection made in the principal cause is, that there is no specific account of the debts due from the deceased. Upon this, it is sufficient to remark, that the statute does not require it. It calls for the amount of the debts and charges, and not for an account of them. It is not like the New York statute, and therefore *Ford v. Walsworth*, 15 Wend. 450, and 19 Ib. 334, and *Corwin v. Merrill*, 3 Barb. 341, are not entirely similar to the present case. In the case before us, the amount of the debts and charges is given. There was enough alleged to call into action the powers of the court. If a demurrer should be made the test, as suggested by counsel, we doubt whether he would venture a general demurrer to this petition, under the old practice, when judgment on demurrer was final.

The third objection to this sale is, that the publication of the notice of sale was not sufficient, for that it should have been published three full weeks, whilst it was published but two full weeks and a fraction. The act, (chap. 10, § 13,) authorizes the court, in lieu of another notice, to order notice to be published "three weeks successively, in any newspaper." In this cause, the court ordered it published in that manner. It was published on the 31st of July, and the 7th and 14th of August, and the sale was on the fifteenth. In the former opinion, we said that the terms of this act admit of the question, whether three full weeks were required, or only a publication on some day in each of three weeks, so as to insure at least two full weeks' notice. It may be suggested, appropriately, in reference to this, that whilst peti-

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tioner is pressing for a strict, rigid, even literal, application of the statute, on this point he departs from this course, and wishes a little relaxation of the words; he seeks a meaning; he puts a construction upon them. They do not say three full weeks, but he says they mean that; that that is the true and legal construction. It seems to us, that the administrator has, in this, at least, followed the statute strictly, and we should be loth to apply a construction which loosened the terms, *ex post facto* as it were, in order to destroy a sale. The only adjudication of the court upon these words of the act, would be in the order for publication, and that is in nearly the same language with the act. The latter says, "three weeks successively," and the order says, "three successive weeks." It is probable that any one giving an *a priori* and directory construction to these words, would prefer to give that which called for the longest time; not because the words necessarily mean that, but in consideration of the object of the publication. When, however, an accurate construction becomes necessary, and the consequence is the sustaining or overthrow of sales and titles which have stood for ten years, we cannot say that the statute necessarily means, in these words, more than it says. We are referred to the case of *Early v. Doe*, 16 How. 615, (21 Curtis, 317,) as conclusive for the other view. We would refer to the case as sustaining the view we have taken. Let us look at the case carefully, and see the facts and the reasoning of the court. It relates to the notice of a sale for taxes. The statute required the notice to be inserted "once in each week, for at least twelve successive weeks." The notice was inserted from the 26th August to the 15th November, inclusive, the latter day being the day of sale, and making eighty-two days, and not eighty-four. The court say, the question is, whether the statute means that twelve insertions in successive weeks is sufficient notice. "We do not doubt," say they, "if the statute had been 'once in each week for twelve successive weeks,' a previous notice of the particular day of sale having been given to the owner, that it might very well be concluded that twelve notices, in different successive weeks,

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though the last insertion was on the day of sale, was sufficient." This remark covers the present case precisely. Then the court proceeds: "But when the legislator has used the words 'for at least twelve successive weeks,' we cannot doubt that the words 'at least,' as they would do in common parlance, mean a duration of the time there is in the twelve weeks, or eighty-four days." They say that the other construction leaves out of consideration the words "for at least." There is a slight ambiguity in a part of their remarks, but they say explicitly, we do not doubt that if the statute had been, "once in each week for twelve successive weeks," it would have been good, though there were not eighty-four days.

The fourth objection to these proceedings, is made to the notice of the pendency of the petition for leave to sell. The objection is to the qualities of the notice itself. The notice is thus presented in the record of the proceedings of the Probate Court: "At a court held at Bloomington, on the 25th July, 1846, the administrator filed the following affidavit: 'All persons interested are hereby notified,' &c., that he would petition for license to sell, the hearing of which will be on Saturday, the 25th inst., at Bloomington, before his Honor, T. S. PARVIN, judge of probate, when and where," &c. The affidavit of publication attached, is entitled of the territory of Iowa and county of Muscatine. The objections are, that the county and state do not appear in the notice; the lands are not described; and the court is not named, but the judge only. It will be noticed that this is but the recital, in the affidavit or record, of the body of the notice, and it does not import that there was not a proper caption, showing the state, county, and even the court. But we do not propose to examine this objection in detail, for there are two observations to be applied to it: *First*, The court finds, expressly, "that all interested have been duly notified;" and under this, we will presume that the paper possessed the requisite external forms. And, *Secondly*, This objection is made for the first time now, on the petition for a rehearing. It was not presented on the first argument.

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The first three objections named above, were the ones presented, as shown by the written brief of the party.

But however this may be, we must set down his record of facts, and the adjudication of the court, as sufficient to cover the objection. In this, we feel sustained by the cases before cited, but desire to add two or three to the list, as throwing light on these questions. The case of *Dykman v. The Mayor, &c., of New York* (1 Seld. 434), is referred to and commented on in *Sheldon v. Wright* (1 Seld. 497), so fully that it seems requisite to give the substance of the former case, first, upon the present point. That was a case of proceedings under the right of eminent domain. The city took a portion of the appellant's land, upon which to build the Reservoir of the Croton Water Works. The statute law is, that the commissioners should first endeavor, *bona fide*, to purchase the land by private agreement, but if the owner and commissioners cannot agree, then the vice-chancellor has jurisdiction of the matter, upon proper proceedings, to condemn the land. Either party can bring it before that officer by petition. In the above case, the mayor, &c., filed the petition, and alleged such disagreement, and the petition was sworn to by one of the commissioners. It was held that the disagreement between the owner and the commissioners, was an essential prerequisite to the jurisdiction of the vice-chancellor.

In a collateral proceeding, attacking those by which the land was condemned, the appellant sought to contradict and disprove this allegation. This is the point of present attention. It was held to be an issuable fact. Foot, J., who delivered the opinion, says: "The real question in this cause, is whether the appellant could contradict the record by proof, and thus collaterally open and review the proceedings, &c. On examining the authorities respecting the conclusiveness of records on jurisdictional questions, there will be found great and irreconcilable diversity." He then takes the proposition, that when the jurisdiction of a court of limited authority, depends upon a fact which must be ascertained by that court, and such fact appears and is stated in

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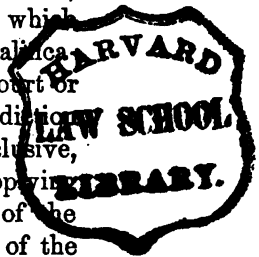
the record of its proceedings, a party who had an opportunity to controvert the jurisdictional fact, but did not, and contested upon the merits, cannot afterwards, in a collateral action against his adversary, impeach the record, and show the jurisdictional fact therein stated, to be untrue; and he cites several authorities.

The case of *Sheldon v. Wright*, (1 Seld. 497,) was ejectment for land, brought by the heir, in which he attacked the sale made by the administrator, for the payment of debts. The second point made, related to the publication of the order to show cause. This is held to be "a jurisdictional fact, of the evidence of which the surrogate must necessarily judge. He has judged and decided that the order was published as required by the statute, and his judgment appears on the record of his proceedings." The question arises how does this appear. The record recites, in the usual manner of record recitals, that the order had been published. The court then proceeds: "The first inquiry is, can that judgment be overhauled in this collateral action, at the instance of the appellant?" They refer to *Dykman v. The Mayor*, as deciding a similar question, but say: "An important particular in which the present case differs from that of *Dykman v. The Mayor*, is, that in the latter, Dykman appeared in the summary proceedings, and litigated, while in the former, the appellant did not appear. The question then arises, does his omission place him in a more favorable condition for litigating the jurisdictional fact? or, in other words, can a party to a judicial proceeding, by lying by and omitting to appear, acquire a right to open the proceedings at any time, and litigate in a collateral action, a jurisdictional fact? It will be perceived at once, that if the right depends on appearance or non-appearance, the fact that the party claiming it has been served with personal or statutory notice, makes no difference." The court here means, it is presumed, that it makes no difference by which method the party has been served; for they go on and say, that if there is any difference, it is in favor of the personal notice, for the reason that this is, in general, more difficult to prove than

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one by publication, after a lapse of time. They proceed : "It cannot be, therefore, that the acknowledgment or denial of the right of a party to disregard the record, and collaterally litigate a jurisdictional fact, depends on his appearance or non-appearance; but it rests upon a broader and deeper ground—which is, that when a court or judicial officer, in the exercise of rightful functions, adjudges upon a matter, that judgment is final, and is conclusive on the facts which it embraces." The court then say, there are some qualifications of this principle, one of which is, "that if the court or officer which pronounces the judgment, has not jurisdiction of the subject and parties, the judgment is not conclusive, and the difficult and important point for decision, (applying to the case then in hand,) is whether the judgment of the surrogate is conclusive on the fact of the publication of the order for persons interested to appear. In my opinion it is. When THOMPSON, C. J., said, in the case of *Borden v. Fitch*, 15 Johns. 141, that 'the want of jurisdiction is a matter that may always be set up against a judgment;' and SPENCER, C. J., quoted his language with approbation, in *Mills v. Martin*, 19 Johns. 33, and SUTHERLAND, J., repeated it in *Latham v. Egerton*, 9 Cow. 229; these distinguished judges doubtless intended only to say, that the want of jurisdiction might always be set up against a judgment, when it appeared on the record, or was presented in any other unexceptionable manner." "We then have a case, where a party resided within the jurisdiction, where there is evidence on the record, that the statutory notice was given, and the judgment that such notice was full and perfect; and we are asked, in a collateral action, to disregard the surrogate's judgment, and open and investigate the jurisdictional fact of publication of the notice."

In the foregoing case, the facts which were proven, are shown, and the court refuse to look back to them. The judgment was no more full, than in the case at bar. This case shows that the court does and must decide on its jurisdiction, in these matters. It is true, it goes the length that you cannot contradict the record on an appropriate matter



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found or adjudicated, but there is much other authority also to the same point. That decision is by a court of high character, and is a recent one, being made in 1851. The case of *Miller v. Brinkerhoff*, 4 Denio, 118, is to the doctrine, that when certain facts are to be proved to a court of special and limited jurisdiction, as a ground for issuing process, if there be a total defect of evidence as to any essential fact, the process will be declared void, in whatever form the question may arise. But when the proof has a legal tendency to make out a proper case, then, although the proof may be slight and inconclusive, the process will be valid, until it is set aside by a direct proceeding for that purpose. In the one case, the court acts without authority; in the other, it only errs in judgment, upon a question properly before it for adjudication. In one case, there is a defect of jurisdiction; in the other, only an error of judgment.

There are a few points upon which the former opinion of this court appears to have been misconceived, probably on account of its too great generality. One of these relates to the Probate Court being satisfied of its own jurisdiction. We have not held that the court may assume jurisdiction, and that this shall be conclusive, except on error. We have recognized those cases which hold, that where there is a want, a destitution, of evidence of the jurisdictional facts, the question may be raised collaterally; but when there is such evidence—for instance, where there is a petition, a notice, &c., and the only question is of its sufficiency under a construction of either the law or the paper itself—then, so far, the court must judge of its own jurisdiction, and its adjudication is good, until set aside in some regular manner.

The order of the Probate Court, is not to give "twenty-one days' notice." This is a construction, and involves one of the questions of the case, and therefore is not to be gratuitously assumed. The argument of counsel for petitioner, on rehearing, intimates that there is no proper evidence of record, or in the papers, of the advertisement of the sale. Among the proceedings of the District Court, we find, (over the hand of the judge of that court,) that "it was shown and

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admitted, that the notice of sale was published," as before stated. This is a sufficient proof of the fact, certainly, for the purposes of the court; and we would suppose we had misapprehended the objection, were it not too clear on the argument. In this cause, we did not intend to place any part of the decision, upon the ground of the confirmation of the sale, by the Probate Court. This idea applies to sales by guardians, of the estate of their wards, and, therefore, has place in the opinion in the case of *Cooper v. Sunderland*, but it does not apply to an administrator's sale. In the preceding opinion, in this cause, and that of *Cooper v. Sunderland*, we speak of correcting the errors of the Probate Court, on appeal, &c. Our language has been taken too literally. Besides appeals, there are writs of certiorari, motions to set aside, and special motions, &c. The language is intended to indicate any of the methods of correcting errors and proceedings, whether by appeal, writ of error certiorari, or motion, to the same court; and is used to point to any or all of these modes, as distinguished from a collateral impeachment of the proceeding.

We have thus endeavored to review this cause, with a reference to those cases which approach the nearest to the precise points made, and which have been most rigid in their construction; and are constrained to abide by the conclusion, at which we arrived in the former opinion. But we are supported and strengthened yet more, when we refer to the cases cited in the former opinions, and principally, in *Cooper v. Sunderland*, from the federal courts, and especially that of *Grignon's Lessee v. Astor*, 2 How. 317, (15 Curtis, 125,) and those in 11 S. & R. 429; 11 Mass. 227, and the later one of *Betts v. Bagley*, 12 Pick. 571, 582. It is by no means clear, but that these cases establish a doctrine, going much beyond what is demanded, to sustain the proceedings in the present cause.

The former opinion of this court is sustained, and the judgment of the District Court is reversed.

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A party in possession of a promissory note by assignment, is presumed to be the owner.

When the note is assigned before maturity, such assignment is *prima facie* evidence, that the note was received by the holder, upon a valuable consideration, in the usual course of business.

Whatever may be the state of facts as to the consideration, between the maker and payee, there is no presumption against the holder, that he has not paid a valuable consideration for the note; and a jury will not be authorized by any evidence of fraud or want of consideration, between the original parties to the note, to infer that it was assigned after maturity, or that no consideration was paid for it by the holder.

The assignment itself imports a consideration, and until the presumption of consideration is rebutted, the holder need offer no other proof.

Where the maker of a promissory note, claims that the assignee received the note, with notice of fraud, or want of consideration in its inception, such notice must be proved; and the assignee cannot be charged with such notice, by reason of any want of diligence on his part, in ascertaining the fact of such fraud or want of consideration, even when he is in a situation where such facts could be ascertained by inquiry.

Where there is a sufficient defence, as between the payee and the maker of a promissory note, the innocent holder cannot be called upon to account when, or upon what consideration, the note was transferred to him, or how it came into his hands, until after something has been shown affecting the *bona fides* of his possession.

Where suit is brought on a promissory note in the name of an assignee, to which the defendant pleads fraud and the want of consideration, the *onus* of showing the fraud and want of consideration, and that the plaintiff is not a *bona fide* holder of the note, for a valuable consideration, without notice of the alleged fraud, rests upon the defendant.

Where a plaintiff establishes by proof, more than is necessary to make out his case, the defendant is not injured, so that he can reasonably complain.

Where, in an action on a promissory note brought in the name of the assignee, the defendant pleaded fraud and want of consideration, upon which issue was joined; and where the defendant failed to establish the main branch of his defence, in relation to the fraud and want of consideration; and where the court excluded certain depositions taken by the defendant, which depositions tended to show, that the plaintiff and the payee of the note, subsequent to the assignment thereof, were connected in business transactions similar to that for which the note was given; *Held*, That the defendant was not injured by the exclusion of the depositions.

Appeal from the Jones District Court.

SUIT on two negotiable promissory notes, for \$250 each,

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dated February 5, 1852, and payable one in one year and the other in two years from date, given by defendant to one P. Byam, and assigned to plaintiff April 10, 1852. The defence was, that the notes were obtained by fraud: that the consideration for which they were given had failed; and that the plaintiff was not a *bona fide* holder of the notes, but that they are still the property of Byam, the payee, and held by plaintiff as agent and trustee for him, plaintiff having paid no consideration for them. The answer is denied by the replication of plaintiff, and issue joined thereon. During the progress of the trial, exceptions were taken by defendant to the ruling out of certain depositions taken by defendant, and to the admission of certain testimony offered by plaintiff, and also to the giving and refusing certain instructions. The jury found a verdict for plaintiff for \$699.24, for which judgment was rendered. Defendant appeals. The instructions refused will be found in the opinion of the court.

W. J. Henry, for the appellant.

Whitaker & Grant, for the appellee.

STOCKTON, J.—The execution of the notes sued on was admitted by defendant. Upon him, however, devolved the burden of showing that they were obtained by fraud, and were without consideration; and that the plaintiff was not a *bona fide* holder thereof for a valuable consideration, without notice of the alleged fraud or want of consideration between the maker and payee. The defendant avers in his answer, that the notes were given for an interest in the Parker water wheel, assigned to plaintiff, by Byam, the payee of the notes; that Byam had represented that he owned and had the exclusive right to dispose of the same for the state of Iowa; that Byam at the time, had no such right; that his representations were false, and intended to cheat and defraud the defendant; that the plaintiff and Byam were partners in the said sale, the plaintiff having paid no consideration for the notes, and being only the agent and

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trustee of Byam in bringing the suit; and that at the time of the assignment of said notes, plaintiff well knew that defendant had a good defence thereto.

It is assigned for error by defendant, that the court permitted plaintiff to give in evidence the patent right for the "improvement on the percussion and re-action water wheel," and the assignment of the same to Byam. We think there was no error in permitting the evidence to go to the jury. The papers were duly authenticated, and one of the averments of defendant's answer, is that Byam had no interest in said patent right. The affirmative of the issue being on the defendant, it was his duty to prove that Byam had no interest in the Parker water wheel. As he did not do so, it was not incumbent on plaintiff to show that Byam had such interest; but if he does show it, we do not see that defendant is damaged so that he can reasonably complain.

The second assignment of error relates to the exclusion of certain depositions taken by defendant. These depositions did not tend to prove or disprove any fact in issue between the parties. The reason why they were excluded does not appear in the record, nor does the defendant attempt to show or explain wherein the court erred in suppressing them. The witnesses knew nothing of the title of Byam to the patent right, and all that they testify to, is the connection of Byam and plaintiff, in the business of selling rights to Parker's water wheel, subsequent to the time of the assignment of the notes. Even if they fully establish the averment in the answer of defendant, as to the right and title of the notes being still in Byam, as we think that defendant has not established the main branch of his defence in relation to the fraud and failure of consideration, we do not see that the exclusion of the depositions has wrought any injury to his case.

The third and fourth assignments of errors refer to certain instructions to the jury, given by the court at the request of the plaintiff, and others asked to be given by defendant and refused by the court. As the defendant offered no evidence of the failure of consideration, or of the fact that the notes

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were obtained by fraud, or that they were not assigned for a valuable consideration ; and as the instructions given at the request of the plaintiff are to the effect that the execution of the note and assignment being proved, plaintiff is *prima facie* entitled to recover, unless defendant proved the fraud or failure of consideration, and notice thereof to plaintiff, it will be unnecessary for us to consider the instructions at length, which were given at plaintiff's request.

The court refused to give the following instructions asked by defendant:

1. That if the jury believe that the consideration for the notes given by Ford to Byam, was a right to the Parker water wheel, and that the patent right on the same had expired before the sale to the defendant, there was no consideration for said notes ; and if they believe that plaintiff had notice of the want of consideration, or was in a situation where, by using reasonable diligence, he might have known the fact, they must find for defendant.

2. That when fraud or illegality is established in obtaining a promissory note by the payee against the maker, and the note is assigned, the assignee must prove that he took the note in the regular course of business, before it became due, for a valuable consideration, and without notice of the fraud or illegality.

3. Where fraud or illegality is established, there is a presumption of law that there was no consideration paid by the assignee to the assignor, for the transfer of the note ; but the presumption of law is that the payee, not being able to sue on the note in his own name, has handed it over to another person to sue upon it for his benefit. This presumption so raised by the law, must be rebutted by the holder showing affirmatively, that he gave value for the note.

4. That if the jury believe that plaintiff and Byam were connected together in the sale of a right or patent to the Parker water wheel, after the right on said wheel had expired, and that they usually took notes, on making sale of such pretended right, and were engaged in no other business upon which they were taking promissory notes, this would

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be a circumstance which, unexplained by the plaintiff, would warrant the jury in concluding, that plaintiff knew that said notes had been given for said pretended right, and that they must find for defendant.

5. That if the jury believe that the notes given by Ford to Byam, were obtained upon the fraudulent representation of Byam, then they are not authorized to infer that said notes were assigned at the time they purport to have been by the assignment made on the back of them; neither is said assignment evidence of any value having been paid by the holder of said notes.

These instructions asked by the defendant, we think were properly refused by the court. Even if correct as legal propositions, the refusal to give them as law to the jury, could in no wise prejudice defendant's cause. They were based upon the assumption that fraud and illegality had been established between the maker and payee, as to the consideration of the note. It is assumed that the patent right to the improvement in the Parker water wheel, had expired by limitation at the time of the sale to defendant. There can be no pretence that any evidence of this fact was offered to the jury by defendant, and that introduced by plaintiff showed clearly that the right had not expired, but was in full force.

But the instructions were incorrect, and were properly refused, because they did not rightly state the law. The plaintiff being in possession of the note by assignment, is presumed to be the owner. Such assignment is *prima facie* evidence that the note was received by him upon a valuable consideration, in the usual course of business. When a note is assigned before maturity, whatever may be the state of facts, as to the consideration, between the maker and the payee, there is no presumption against the holder, that he had not paid a valuable consideration for it; and a jury would not be authorized by any evidence of fraud or want of consideration between the original parties, to infer that the note was assigned after maturity, or that no consideration was paid for it by the holder. The assignment itself

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imports a consideration, and until such presumption is rebutted, the holder need offer no other. If defendant claims that the assignee received the note with notice of fraud, or want of consideration in its inception, such notice must be proved, and plaintiff cannot be charged with such notice by reason of any want of diligence on his part, in ascertaining the fact of such fraud or want of consideration, even when he is in a situation where such facts could be ascertained by inquiry. Where there is a sufficient defence as between the payee and the maker of a promissory note, the innocent holder cannot be called upon to account when, or upon what consideration, the note was transferred to him, or how it came into his hands. Byles on Bills, 61; *Morton v. Rogers*, 14 Wend. 580; 6 Wend. 621.

The rule that in an action by a *bona fide* holder of a bill or note, transferred before due, without notice, the want or illegality of consideration cannot be shown, except where the note has been declared void by the statute, has not been adhered to in some of the modern decisions in England; and it has there been held, that upon proof of want or failure of consideration, as between the maker and payee, the plaintiff must show how the note came into his possession, and that he received it in the regular course of business for a good consideration. 2 B. & A. 291; 14 Wend. 581. The rule as laid down by Mr. Chitty, is that the holder of a bill or note need not, in the first instance, show a consideration; possession proves property; but if there is any suspicious circumstance as to the *bona fides* of his possession, and the defendant has a good defence against the payees, then the holder must show that he paid value for it; as if the note has been lost or stolen, or fraudulently put into circulation, then the plaintiff must show that he came lawfully by it and paid value for it. Chitty on Bills, 1045; *Vallette v. Parker*, 6 Wend. 621; 3 Johnson's Cases, 260. There was no evidence in this case, to cast a suspicion of bad faith on the possession of the note by plaintiff, and until such evidence was introduced he could not be required to account for his possession.

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The fourth instruction asked was so vague, inconclusive and foreign to the question at issue; so nearly trenching on the province of the jury, in asking the court to direct what evidence was sufficient to authorize them to find a verdict for the defendant, that it was correctly refused.

By the fifth, the court were asked to instruct the jury that there was so intimate a connection between the consideration of the note, and the consideration of the assignment to plaintiff, that if the first was shown to have failed, the jury were authorized to infer that there was none for the latter. To state such a proposition, is to refute it.

Judgment affirmed.

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A party alleging error to his prejudice, must show it.

In the absence of any showing to the contrary, the presumption is, that there was sufficient evidence to authorize the judgment, and that all the proceedings were regular.

A court, in the exercise of its discretion, may grant a continuance, on account of the absence of counsel.

To show due diligence in an affidavit for a continuance, it is not sufficient to state generally, that such diligence has been used; but the affiant should specify what he has done, that the court may judge of the diligence.

What is, or is not, due diligence, is to be determined by the court, and not by the affiant.

Affidavits for a continuance, should be construed strictly, and most strongly against the applicant.

Where suit was commenced on a promissory note, prior to the June term, 1855, of the Lucas District Court, at which term, the defendant filed an affidavit for a continuance, on account of the absence of certain witnesses residing in Ohio, and the cause was accordingly continued, and where at a subsequent term, (but whether at the September term, 1855, or 1856, it is impossible to determine from the record,) the defendant filed a second application for a continuance, based upon an affidavit, which, after stating what he expected to prove by certain absent witnesses, alleged that his counsel was absent, without stating any cause of absence, or that such absence was unexpected to defendant; and that at the time of making the former affidavit, (on which the first continuance was obtained,) he was informed and believed, that both of the witnesses resided in Guernsey county, Ohio, but he soon thereafter learned, that one of them was still in California, and had not re-

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turned to his home in Ohio, as he had been informed; that for about six weeks or two months of the time since the first continuance, his family was sick, so that he could not attend to his business; that since he learned that one of the witnesses was in California, he has endeavored, *by all means in his power*, considering the sickness of his family, to ascertain the place of residence of the witness, but had not been able to learn the same; *Held*, That the affidavit was insufficient, and the application for a continuance was properly overruled.

Appeal from the Lucas District Court.

THIS action was commenced to recover the amount of a promissory note. Trial and judgment for plaintiff, and defendant appeals. The facts sufficiently appear in the opinion of the court.

J. E. Neal, for the appellant.

Knapp & Caldwell, for the appellee.

WRIGHT, C. J.—It is first objected, that the note sued on was not filed, and that there was therefore nothing to authorize the judgment. What is meant by this objection, is difficult to understand. A copy of the note was attached to the petition, and the record entry of judgment shows that the parties appeared, “and the cause and proceedings being fully heard and inspected, and all things touching the same, it is considered by the court, &c.” It is true that the record does not show affirmatively, that the note was introduced in evidence. Neither is there anything to show whether it was or was not filed in court.

Nor is it necessary that these things should appear affirmatively. The party alleging error to his prejudice, must show it. We will not presume that the original note was not offered in evidence. In the absence of any showing to the contrary, the presumption is, that there was sufficient testimony to authorize the judgment, and that all the proceedings were regular.

The second position, that the original notice and petition, claim a less sum than that for which judgment was ren-

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dered, is based most evidently upon a misconception of the record. They both claim a larger sum than that for which the plaintiff obtained judgment.

The third objection, and the one principally relied upon, is that the court erred in overruling defendant's application for a continuance. Without stopping to consider whether this court will revise the action of the District Court in refusing a continuance, it is sufficient to say, that we see no reason for doubting the correctness of the ruling made in the present case. When this suit was commenced, is not shown, except that it was prior to the June term, 1855, of the Lucas District Court. At that term, the defendant filed an affidavit for a continuance, on account of the absence of certain witnesses, residing in Guernsey county, Ohio. The cause was accordingly continued. At a subsequent term, (but whether at the September term, 1855 or 1856, it is impossible to say from the record,) he filed a second application, which was overruled; and it is this ruling of which he now complains. Two grounds are stated in the affidavit: the first being the absence of defendant's counsel; and the second, the absence of the same witnesses named in the former application. That a court may, in the exercise of its discretion, grant a continuance on account of the absence of counsel, we entertain no doubt; but when an application based upon this ground, is refused, we should require very strong circumstances indeed, manifesting a clear abuse of this discretion, before we would interfere with its exercise. In this case, no such abuse appears. Why the defendant's counsel was not present, is not shown. For ought that appears, he was purposely absent. It is not averred that he was sick, (as in *Shultze v. Moore*, 1 McLean, 384,) that he was kept away by any casualty or unforeseen circumstances, nor is any reason given for such absence. Neither is it shown, that such counsel had in his possession papers material or necessary to the defence. Under such circumstances, we cannot say that the application was improperly overruled. *McKay v. Marine Insurance Co.*, 2 Caines, 384.

The Code provides, that continuances shall not be granted,

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for any cause growing out of the fault or negligence of the party applying therefor. Subject to this rule, however, continuances may be allowed for any cause which satisfies the court, that substantial justice will thereby be more nearly attained. When the motion is made on account of the absence of witnesses, it must be accompanied by an affidavit, showing among other things, that due diligence has been used to obtain such testimony. Sections 1765, 1766. To show such diligence, it is not sufficient to state generally, that due diligence has been used; but the affiant should set forth and specify what has been done, that the court may judge of the diligence. What is or is not, due diligence in the particular case, is to be determined by the court, and not by the affiant. Again: parties making their affidavits, have the facts peculiarly within their own knowledge, and are presumed to make their statements quite as favorable to their own views and interests, as the truth in the premises will warrant; and therefore, as a general rule, such affidavits should be construed strictly, and most strongly against the applicant. *Mason v. Anderson*, 3 Mon. 293; *Auras v. State*, 2 Litt. 233. Determining the case before us in view of the above rules, we think the motion for a continuance on account of the absence of witnesses, was properly overruled. The affidavit fails to show due diligence.

We have already stated, that it is impossible to say from the record, whether the application was made at the term in September, 1855 or 1856. The affidavit was sworn to, September, 1856; this may be a clerical mistake; but there are strong reasons for believing that this is the true time, while there are others, perhaps, quite as conclusive, that it was made in 1855. Under such circumstances, in view of the well recognized rule, that the court below is presumed to have decided correctly, we should adopt the ground that the application was made in 1856. Upon this hypothesis, then, it appears that in June, 1855, a continuance was granted this party, and fifteen months afterwards, he applies for a further continuance, to obtain the testimony of the same witnesses named in his first affidavit. To account for

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his delay in not taking the depositions, he avers that for about six weeks or two months of the time, his family was sick, so that he could not attend to his business; and yet, no reason is shown why he did not, in the remaining thirteen months, take some steps to obtain their testimony.

But, if we adopt the position that this affidavit was made in 1855, how does the case stand? He states that at the time of making the former affidavit, he was informed and believed, that both of the witnesses resided in Guernsey county, Ohio, but that soon thereafter, he learned that one of them was still in California, and had not returned to his home in Ohio, as he had been informed; "and that since he learned that fact, he had endeavored, by all the means in his power, considering the sickness of his family, to ascertain the place of residence of said witness, in order to take his deposition in California, but has not been able to ascertain his residence." This is not sufficient. He should state what means he did make use of, so that the court might judge whether they were likely to be successful. To say that he used all the means within his power, is too vague and indefinite. As to the other witness, there is no pretence, but that he resided in Guernsey county, Ohio; and yet no steps were taken for obtaining his deposition, and no sufficient excuse shown for not doing so. It is true that the affidavit states that his family was sick, but this was for only about one-half the time intervening between the June and September terms, 1855; and if we even concede that during such sickness, he shows an inability to attend to the procuring of these depositions, he is without excuse, as far as we can see from this record, for the remaining portion of the time.

Judgment affirmed.

CARNES v. CRANDALL.

A *scire facias* is the proper mode of proceeding to revive a judgment, and must be brought in the county where the judgment was obtained.

Where a party seeks to revive a judgment against the administrator of a deceased party, and to make the heir of such deceased person, a party to the proceedings, so as to obtain execution against the real estate of the defendant in the judgment, it is not necessary that the proceedings should be separate.

Section 1367 of the Code, in relation to unsatisfied judgments rendered prior to the death of the decedent, does not apply to cases where a judgment plaintiff is seeking to subject real estate to the satisfaction of his judgment. It applies only, where the party is seeking satisfaction from the personality. Where judgment was obtained against C., on the 3d day of September, 1851, in the District Court of Marion county; and where, on the 29th day of November, 1851, a transcript of this judgment was filed in the office of the clerk of the District Court in Mahaska, the said C. being at the time the owner of certain real estate, situate in that county; and where the said C. died subsequent to the rendition of the judgment, and the filing of the transcript in Mahaska county; and where the plaintiff in the judgment, on the 11th day of April, 1856, filed his petition on the chancery side of the District Court of Mahaska county, against the administrator and heir at law of the said C., praying that a decree may be rendered, declaring said judgment a lien upon the land situate in Mahaska county; that the judgment may be revived; and that the land may be sold; and where the petition was demurred to on the following grounds: 1. That the plaintiff had a full and adequate remedy at law. 2. That a dormant judgment at law cannot be revived in chancery. 3. That the claim is cognizable only in the county court. 4. That the claim was barred by section 1373 of the Code, which demurrer was sustained by the court; *Held*, 1. That the claim was not barred by section 1373 of the Code. 2. That the demurrer was properly sustained.

Appeal from the Mahaska District Court.

THE petition represents that on the 3d day of September, 1851, in the District Court in Marion county, the petitioner recovered a judgment against Anson Crandall, then living; and that on the 29th November, 1851, a transcript of this judgment was filed in the office of the clerk of the District Court in Mahaska county; that after this, said Anson Crandall deceased; that at the time of the rendition of the above judgment, said Crandall owned certain real estate in Mahaska

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county, which is described; and that no part of the judgment has been paid.

The petition farther alleges that there was no property (save the real property) belonging to the estate of said Crandall, except such as was exempt from the payment of debts against the said estate; that Mary Crandall, the widow of deceased, has been appointed administrator; that the deceased left only one child—that is, the said Eveline—who is his sole heir at law. The petitioner alleges that the county judge has authorized the prosecution of this suit. He makes both the administrator and heir parties, and prays that a decree may be rendered, declaring said judgment a lien upon the land described, situate in Mahaska county; that the judgment be revived; and that so much of the lands be ordered to be sold as will pay the judgment, interest and costs, and for general relief. To this petition the respondent demurred for various causes—as that it is a petition in chancery addressed to a court of law; that the petitioner has a full remedy at law; that the claim is barred by section 1373 of the Code; and that the claim had not been filed in probate office. The demurrer was sustained, and the bill dismissed, at the costs of the complainant, from which decision he appeals.

W. H. & Jas. A. Seevers, for the appellant.

Crookham & Fisher, for the appellee.

WOODWARD, J.—It is not necessary to enter into a detailed consideration of the questions raised on the pleadings, by the arguments of counsel.

The petitioner appears to have misconceived, in some measure, either the remedy which he wants, or the means of obtaining it. He does not need a decree in equity to make his judgment a lien on the land in Mahaska county. It is so already, by virtue of the law and the filing of the transcript. He wants, first, to revive his judgment against the administrator, so as to make her a party, and so as to be able to issue execution.

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For this purpose, a *scire facias* is the method pointed out by law. This is regulated in some small degree, by chapter 124, page 300, of the Code. It would be difficult, at least, to bring this petition within the idea of a *scire facias*. But we do not stop to discuss this point. Another difficulty presenting itself is, that a *scire facias* must be brought in the county where the original judgment was obtained—that is, where the record is; and the plaintiff seeks to make the administrator a party to that judgment.

The petitioner farther wants to make the heir a party to the proceeding, in some manner, so as to obtain execution against the real estate. In this respect the plaintiff is sufficiently correct; but this will not relieve him of the necessity of reviving his judgment against the administrator in the county where the record exists. It does not follow, however, that these objects would require separate proceedings, or that they may not be united in one in that county, where one of them must necessarily be; or that the court may not order the subjection of the lands in the same process.

The leading error in the case is, that one of the objects sought, requires to be pursued in Marion county, where the original record remains.

On subjecting the real estate, see *Postlewait et al. v. Howes*, 8 Iowa, 365. The claim is not barred by Code, section 1373. If that section would, taken alone, bar it, the section is answered or explained by section 1362.

Section 1367, as to filing this as an unsatisfied claim, would apply, if the petitioner were seeking its satisfaction out of the personalty. But he alleges that there is no personal property liable, and he is aiming to revive it against the administrator, and to reach the real property.

The decree of the District Court is affirmed.

 McKinney v. Hartman.

MCKINNEY v. HARTMAN.

It is no part of the duty of a jury, nor have they any right, to determine from the pleadings, what allegations are admitted or denied.

It is the province of the court alone, to examine the pleadings; and if any of the allegations are to be taken as true, for want of the necessary denial, to so state to the jury.

Where, in an action for the forcible detention of real estate, commenced and tried before a justice of the peace, and taken by appeal to the District Court, and in which action the defendant answered, "not guilty," the jury in the District Court were instructed, that every material allegation in the petition, not specifically denied by the answer, should be taken as true; *Held*, That the instruction, as an abstract proposition, was correct; but that the effect of it, was to submit to the jury a question that should have been determined by the court.

And where in such a case, the defendant asked the court to instruct the jury, "that a plea of not guilty was a sufficient denial of the plaintiff's petition, and was sufficient to put the plaintiff upon proof of every material allegation set up in his petition," which instruction the court refused to give; *Held*, That under the circumstances of the case—the record showing there had been a trial before the justice of the peace, and the objection to the sufficiency of the answer being made for the first time in the District Court, after the testimony was submitted to the jury—the instruction should have been given.

Appeal from the Davis District Court.

THIS action was commenced before a justice of the peace, to recover the possession of certain real estate, which the plaintiff alleges was forcibly detained by defendant. The petition avers, that he leased the disputed premises to defendant for a certain term, for so much rent per month; that by the lease, which was in writing, said defendant was to deliver to plaintiff the possession of the premises at the expiration of the term; but that the said term has expired, and defendant willfully holds over and refuses to quit the possession and deliver the same to plaintiff. To this petition defendant appeared, and answered in writing as follows:

"And now comes defendant, and for answer says, not guilty.

"JONES, for Defendant."

McKinney v. Hartman.

Jury trial before the justice—verdict and judgment for defendant. Plaintiff appealed, and on the trial in the District Court, the following instruction was given: that every material allegation in the plaintiff's petition, not specifically denied by the answer of the defendant, should be taken as true. The following instruction asked by defendant, was refused: that a plea of not guilty was a sufficient denial of the plaintiff's petition, and was sufficient to put the plaintiff upon the proof of every material allegation set up in his petition. To the giving and refusing of which instructions, defendant excepted. Verdict and judgment for plaintiff; and the defendant appeals.

M. H. Jones, for the appellant.

Knapp & Caldwell, for the appellee.

WRIGHT, C. J.—As an abstract proposition properly construed, the instruction *given*, is most clearly correct. To it, as a rule, there can be no reasonable or just exception. The effect of it, however, is to submit to the jury a question that should be determined by the court. It is no part of the duty of the jury, nor have they any right to determine from the pleadings, what allegations are admitted or denied. When a question of this character is raised, it is the province of the court alone to examine the pleadings, and if any allegations are to be taken as true for want of the necessary denial, to so state to the jury. To permit the jury to construe the pleadings, should no more be allowed, than to submit to them the decision of the law arising in the case. Such a practice is opposed to the letter and spirit of our judicial organization. One controlling objection to such a course, not to mention others, is that the party prejudiced by an erroneous construction, would have no opportunity to review the same in the appellate tribunal. We have made these remarks, not because it is clear that in this particular case the laying down of the abstract proposition, so far prejudiced the defendant as to justify a reversal of the

case, but because we have observed that such instructions are frequently given, and that the erroneous practice is increasing.

A more important question, as applied to this case, arises on the instruction refused by the court. And as to this, we may say that the question presented, would have been more appropriately raised upon some objection made to the pleadings before trial, than by the asking of an instruction to the jury. As it stands and is presented, however, the simple point for our determination is, whether the answer of "not guilty," under the circumstances of this case, was sufficient to put the plaintiff upon proof of every material allegation contained in his petition.

Appellee maintains that this question is settled in his case, by the case of *Dunsmore v. Elliott*, 1 Iowa, 599. In that case, however, the answer set up affirmative matter, which, if proved, was sufficient to defeat plaintiff's action. To this answer there was no replication or response of any kind, nor any pretence that there was any. And it was accordingly held, that the answer not being denied, was to be taken as true. To make that case authority in this, is to assume or take for granted that there is no answer to plaintiff's petition, which is the very point in controversy, and to be determined.

Again: it is urged, that abstractly it was right to refuse the instruction; that the bill of exceptions does not contain sufficient to show that in this particular case the ruling was wrong. We cannot think, however, that this case comes within the class of cases relied upon by appellee. The record does show that defendant answered "not guilty." And notwithstanding this, the jury were told substantially, that such an answer was not sufficient to put the plaintiff upon proof of the material allegations of his petition—or, in other words, the doctrine laid down or recognized by refusing this instruction, is that the answer did not so specifically deny the affirmative allegations of the petition to which it should respond, as to prevent plaintiff's recovery, though he might introduce no proof, and in effect that such an answer

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amounted to no defence whatever to plaintiff's action. The instruction is not one that might be right or wrong, depending upon the state of the proof. For if it is said, that for aught that appears to the contrary, there was evidence fully sustaining every material allegation of the plaintiff's petition, the answer is, that the court could not for that reason refuse the instruction; for the sufficiency of the proof was a question for the jury, and not for the court. The question therefore remains, whether this instruction was properly refused, or whether the answer was sufficient under the circumstances, to put the plaintiff upon proof of the material parts of his petition. And did this question arise in a case originating in the District Court, we should perhaps not be unanimous. The case having been commenced before a justice of the peace—there having been there a full trial before a jury upon the issues joined, and the objection to the sufficiency of the answer being made, as far as shown from the record, for the first time, after the whole testimony was submitted to the jury in the District Court, we concur in holding that the instruction should have been given, or that the construction claimed for the pleadings by defendants, at that stage, was correct. In the case of *Sinnamoo v. Millburne*, Dec. term, 1854, the record did not show that any denial of plaintiff's claim had been made before the justice, but the transcript made it sufficiently manifest that there had been a trial, and that defendant had resisted the plaintiff's demand at every stage of the proceedings. And it was there held, that "where there has been a trial of the cause before the justice, a general denial of indebtedness will be presumed, in the absence of anything to the contrary." The defendant was accordingly, under that rule, permitted to show payment, (following *Gilman et al v. Huber*, Dec. term, 1853,) and also a settlement of the matter in controversy, as shown by plaintiff's receipt, dated after the commencement of the suit. Upon the strength of that case, we think it clear that, if payment and settlement may be shown under a general denial, which has no existence except a presumed one, *a priori*, would the plea in this case, under the

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circumstances, put the plaintiff upon proof of the material allegations of his petition. As in that case, so in this, the record clearly shows that there was a full trial before the justice, and that defendant resisted the plaintiff's right to recover at every step.

With a knowledge of the manner in which the pleadings and issues are made up in these inferior tribunals, and in view of the charity which should be exercised in reviewing their proceedings, we think a due regard to the rights of parties, would forbid our treating the answer in this case as no answer; and fully justify the true position, that under the circumstances, plaintiff should be required to prove every material allegation of his petition.

Judgment reversed, and trial *de novo* awarded.

CONVERSE, Administrator v. WARREN.

Where the return to an original notice read as follows: "Served the within notice on the within named F. H. W., by leaving a true copy with E. H. T., he being over fourteen years of age, at the banking-house of G. T. & Co., being the place of business of the defendant. Also, a copy with Mrs. G. at defendant's boarding-house, being the residence of E. E. G. And also, a copy at his sleeping room, over the store of R. S. A., by order of plaintiff's attorneys, this 13th day of April, 1855—the above-named Mrs. G. being over fourteen years of age, and being a member of the family of E. E. G.;" and where at the term of the District Court to which the notice was returnable, the defendant appeared specially, and moved to set aside the return, which motion was overruled by the court; *Held*, 1. That the return was defective in not showing that the house of E. E. G. was the usual place of residence of the defendant, and that Mrs. G. was a member of defendant's family; and 2. That the court erred in overruling the motion.

Where an original notice is served by leaving a copy at the usual place of residence of the defendant, the return must show that the person with whom the copy is left, is a member of the *same* family with the defendant.

The words, "the family," in section 1731 of the Code, mean the family of which the party on whom the service is made, is a member.

Where a defendant has taken objection to the defective service of process, in the proper time and manner, and his objection is overruled, and he required to plead to the action, he does not waive or lose the benefit of his objection, by appearing and pleading. *WRIGHT, C. J., dissenting.*

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Such an appearance must be considered to have been made under protest, and subject to the exception taken to the decision of the court on the objection to the sufficiency of the service.

Where a defendant, at the first term after the commencement of the suit, after his motion to quash the return on the original notice, on the ground of insufficiency, had been overruled, filed his answer, and applied for and obtained a continuance; and where at the second term, the cause was again continued, to afford time to obtain the sworn reply of the plaintiff, called for by the defendant; and where at the third term, the cause was tried, and judgment rendered against the defendant; and where the defendant, on appeal to the Supreme Court, assigned for error the decision of the court, overruling the motion to quash the return on the original notice; *Held*, That if the defendant had been driven into a trial at the first term, he would have been authorized to raise the question as to the sufficiency of the return, in the appellate court; but that having had, to prepare for trial, more than all the time he would have obtained ordinarily, had the service been held insufficient, the overruling the motion to quash the return, was an error that worked no injury to the appellant, and of which he could not complain in the appellate court.

Where, in an action on a promissory note, the defendant objected to the note being offered in evidence, on the ground of variance between that declared on and the one offered—the alleged variance existing in the date of the note; and where, upon the question of variance, the plaintiff called the defendant, and obtained his testimony as to the date of the note; and where the counsel for the defendant, then inquired of the defendant, as to the consideration for the note, and his defence to it, which was objected to by the plaintiff, and the court sustained the objection; *Held*, That the objection was properly sustained.

Appeal from the Des Moines District Court.

SUIT on a promissory note for two thousand dollars, given by defendant to plaintiff's intestate. The original notice issued in the cause, was returned by the sheriff in these words: "Served the within notice on the within named Fitz Henry Warren, by leaving a true copy with E. H. Thomas, he being over fourteen years of age, at the banking-house of Green, Thomas & Co., being the place of business of defendant. Also a copy with Mrs. Gay, at defendant's boarding-house, being the residence of E. E. Gay; and also a copy at his sleeping room, over the store of R. S. Adams, by order of plaintiff's attorneys, this 18th day of April, 1855. The above-named Mrs. Gay being over fourteen years of age, and being a member of the family of E. E. Gay." The

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term of the District Court commenced on the 23d April, 1855. On the second day of the term, on motion of defendant, leave was given him to enter a special appearance, to test the sufficiency of the service of the original notice. A motion made to set aside the return as insufficient in law, was overruled, and the court decided the return good and sufficient in law of itself, to place defendant in court subject to plead. To which decision defendant excepted. At a subsequent day, defendant filed his answer, and on his motion the cause was continued until the next term. At the October term, 1855, the cause was again continued, in order to obtain the sworn replication of the plaintiff to the answer of the defendant. At the April term, 1856, after various intermediate proceedings, judgment was rendered for the plaintiff for \$2,245.31, from which judgment the defendant appeals. The principal error alleged, is that the court erred in overruling the defendant's motion to set aside the sheriff's return. Such other errors as are assigned, are noticed in the opinion of the court.

David Rorer and Browning & Tracy, for the appellant.

1. The service of the original notice and return thereof, was insufficient to place defendant in court; and the defendant, by leave of the court, might well make a special appearance to move to set said return aside. The latter point was so adjudged by this, the Supreme Court of Iowa, in the unpublished case of *Nathan S. Millburn v. William Fouts*. See, also, *Pilkey v. Gleason*, 1 Iowa, 85; *Wynn v. Wyatt*, 11 Leigh, 584; *Lutes v. Perkins*, 6 Mis. 57; *Ferguson v. Ross*, 5 Pike, 517; *Cobb v. Decker*, 1 South, 119. The defendant did make such special appearance by leave of the court, and move to set said return aside, which motion was overruled, and the return adjudged good and sufficient to place defendant in court.

Next, then, under this division of the subject we will look into the return, and will test its sufficiency by the statute and adjudged cases. By the Code, service must be personal, if defendant is found. Section 1721, 252. If not

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found, service may be made "by a copy left at his usual place of residence, with some member of the family, more than fourteen years of age." Code, § 1721, 252. First, then, the return in this case does not show, that defendant was "not found," and without such showing, a service by copy is not valid; for they are not independent and alternative modes of service, but the one, to be valid, must depend upon the impracticability of the other. The sheriff cannot choose between the two modes. There is, in law, a third mode of service—it is by publication; and yet such service cannot be made until after return of not found. There is an adjudged case bearing on this point, but not parallel; it is *Lodge v. State Bank*, 6 Blackf. 557.

The next objection to the return is, that even if a case existed, wherein legal service could be made by copy, yet the service shown by the return is totally insufficient. By the statute, the copy is to be left at his usual place of residence, with some member of the family, over fourteen years of age. The return shows several efforts: One, "by leaving a true copy with E. H. Thomas, he being over fourteen years of age, at the banking-house of Green, Thomas & Co., being the place of business of defendant." Surely this does not fill the requisites of the statute; nor does it appear but defendant was present, or had a place of residence within the bailiwick. The next effort is, by leaving "a copy with Mrs. Gay, at defendant's boarding-house, being the residence of E. E. Gay," she being "over fourteen years of age, and being a member of the family of E. E. Gay," not a member of defendant's family, as is evidently contemplated by the statute, the language of which is, "at his usual place of residence, with some member of the family," meaning the family of defendant. Neither is this one in accordance with the requirements of the statute. He cannot be said to reside at his boarding-house; for, in the same return, as we shall see, it is shown, that defendant had a sleeping-room at a still different place. The next and last effort is, by copy at defendant's "sleeping-room, over the store of R. S. Adams," left with nobody. Neither return, or effort of service, is

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valid; nor are the whole of them any better, when taken together. Where a substitute for personal service is provided, it must be strictly followed. *Romaine v. Commrs. of Muscatine Co.*, Morris, 357; *Diltz v. Chambers*, 2 G. Greene, 479; *Cross Ex parte*, 2 Eng. 44; *Spence v. Medder*, 5 Mis. 458; *Hays v. The Bank U. S.*, Wright (Ohio,) 563; *Smith v. Cohea*, 3 How. (Miss.) 35; *Tomlinson v. Hoyt*, 1 Smedes & Marsh. 515; *Fatheree v. Long*, 5 How. (Miss.) 661; *Wilson v. Greathouse*, 1 Scam. 174. And pleading over to the action, after the overruling such motion to set aside the return, is not a waiver of defendant's rights, under said bill of exceptions; nor is it a waiver of the insufficiency of the service. *Secrest v. Arnett*, 5 Blackf. 366; *Wells v. Hubbard*, 11 Ill. 573; *Buckingham v. McLain*, 13 How. 150.

In all the cases, within our reach, referred to, wherein the defendant is adjudged to have waived his rights, the defendant had taken no bill of exceptions, where the motion was made in time; and, in most of the cases, the motion was not made until after full appearance, and after pleading to the action. The defendant had a right to, not only notice, but to ten days' notice, before he could be considered in court. Now, if there was no service, there was not only no notice, but the ten days' time to prepare in, was wanting, although defendant or his counsel might really, in point of fact, be in or at the court, and the suit might otherwise come to their knowledge; whereas, the decision of the court, deciding that such defective service was compulsory on defendant, really had the effect to coerce defendant into a defence, without any prior time for preparation whatever. By the Code, the defendant might "except to any decision of the court." § 1805, 260. And it is insisted for the defence, that if such decision is found erroneous, that it will not only reverse the judgment, but will arrest the whole case at the very point where the error was committed; for, so far as the defendant remained in court, after said decision, overruling his motion to set aside the return, he was only there in law, by the wrongful and compulsory decision and requirement of

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the court, and was only there in point of fact, in obedience to, and by consequence of, such decision.

The case of *Secrest v. Arnett*, 5 Blackf. 366, is even a stronger case than this, in favor of the plaintiff below, as it does not appear that exceptions were taken by the defendant in that case, to the overruling of his motion; and yet the court held, that the defendant's rights were not waived by pleading over. In that case, the defendant moved to dismiss for insufficiency in the writ. The motion was overruled. The defendant then plead to the action; the cause was tried, and judgment for the plaintiff. The defendant appealed. The Circuit Court, on the appeal, dismissed the suit on this motion of defendant, which was made before the justice of the peace. The plaintiffs then carried the case to the Supreme Court, who affirmed the judgment of dismissal. The Supreme Court in that case, say that, "The plaintiffs contend that the defect in the writ was cured by the plea before the justice; but we do not think so. The objection to the writ was made and overruled, before the appearance and plea to the suit. There was therefore no waiver of the objection." Now, this case is one so precisely in point, and from so high and so recent an authority, that it does seem to us conclusive. We have not obtained access to the original report of the case, cited from 11 Illinois, but believe it to be equally in point with the case from 5 Blackford.

In the case of *Buckingham v. McLain* 13 Howard, 150, though the motion was overruled, yet the case shows conclusively, by the opinion of the Supreme Court, that it was overruled, because a full appearance had been entered before making the motion; and that the motion would have been sustained, if made on special appearance for that purpose. The case of *Grace v. Palmer*, 8 Wheat. 699, is another, in which the doctrine we assert is sustained by implication. The court there say, "where the defendant appears, without taking the exception, it is an admission of the regularity of the service." But in the case under consideration, exception was taken in the first instance, and the appearance was special for that purpose. Waiver of rights is not

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avored, unless clearly intended. *U. States v. Rathbone et al.*, 2 Paine C. C. 579.

2. The court should have permitted the whole evidence of the defendant, when he was introduced by the plaintiff, to go to the jury. The evidence of Mr. Coolbaugh, plaintiff's witness, had gone to the jury, and it was too late, after the defendant's evidence showed a just defence, for the plaintiff to say that such evidence was for the court and not for the jury. We contend, that the defendant having been called and introduced by the plaintiff, we then had a right to his evidence to the whole case, which the court ruled against us.

Starr & Phelps, for the appellee.

As an important and new question has been raised in this case, the decision of which is to govern the future practice of our courts, we ask leave to offer the following considerations in favor of the practice, which we believe to be founded in justice and reason. The question is, whether, under our system of practice, this court should reverse a cause for defective service, after an answer, and full trial of the case, on the merits, although the service was objected to, on special appearance of defendant, and the point saved by bill of exceptions, before answer filed, or general appearance made.

This is, we believe, the first time this question has been raised since the entire and radical change was wrought in the form and spirit of our practice, by the adoption of the Code. The adoption of the Code, was a new era in the jurisprudence of Iowa, and a work of necessity. In many respects, the common law had become so refined, by close adherence to, perhaps, ill-considered precedents, that justice was rather figuratively than actually dispensed, and many a meritorious claim was defeated, for want of a high degree of technical knowledge on the part of the suitor's counsel. This evil had become so glaring—so often had our courts been compelled, by a long array of authorities, to render decisions, for which they confessed they could find no reason, except precedents—that our legislature interfered to relieve them

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from those embarrassments, and appointed a commission, with full power to re-organize our system of procedure and practice, so as to secure to parties litigant a determination of their substantial rights, regardless of "immaterial variances, errors or defects." To this object, the commissioners directed their attention and efforts, and the legislature indorsed their action, by adopting substantially their reports, and by conducting their subsequent legislation, in the spirit of the Code.

It can but be apparent to all who have examined the Code, that its fundamental principle in the administration of justice, is, that all cases shall be tried upon their merits, and that in conducting them, all immaterial variances, errors and defects shall be disregarded. Code, §§ 1757, 1758. To this end, the District Court is expressly directed, and both the District and Supreme Courts are empowered, to adopt such rules as shall preserve the substance of previous remedies, dispensing with all needless forms, "with the view of arriving at the prompt attainment of justice." Code, §§ 1589-91. To say that sections 1757 and 1758, apply only to the District Courts, would involve the absurdity, that the District and Supreme Courts are to be governed by entirely different principles, in "arriving at the prompt attainment of justice."

Again: in construing the Code, its history is important. It is, we believe, generally understood by the profession, that our Code was adopted in the same spirit, and rests upon the same principle, which underlies the Code of Procedure of New York. Both were the creatures of the same necessity, and were adopted for the same purpose; and this court is probably aware, that in the construction of our system, the Code of New York was carefully examined, and the same principle for determining the rights of parties was adopted, with such change in its details as the exigencies of our younger state, and the experience of the commissioners, dictated. New York and Iowa stand alone in this advance in the administration of justice; and to New York alone, can we look for authority upon the construction of civil

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procedure in our Code. If there is any difference in the general spirit of the two Codes, it is in the greater liberality of our own, and that the former has, perhaps, specified what in ours is left to palpable inference.

In the same spirit, but with more particularity, the Code of New York, § 176, (*vide* Van Santvoord's Pleading, 581, 582,) provides: "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." In commenting upon this section, Van Santvoord says: "It furnishes a single test in all cases—a broad and universal test—namely, that if the defect is such as, in the opinion of the court, will not affect the substantial rights of the adverse party, no matter in what that defect shall consist, the judgment will not be reversed or affected thereby. It is but applying to the action in its last stages, the rule which the Code designed to govern its commencement, and to regulate its proceedings throughout, namely, that the action is to be stated, tried and determined on its merits alone, and the substantial rights of the parties, and they alone, are to be regarded as controlling the administration of justice under the forms of law." It is true, that our Code does not contain the exact section which is above quoted from the New York Code, but has left its substance, as to the reversal of causes, to palpable inference; and inferring the principle from the general spirit and expression of our Code, we are "but applying to the action in its last stages, the rule which the Code designs to govern its commencement, and to regulate its proceedings throughout."

Let us, then, apply this principle to the question before us. Is the defective service of the notice in this case, a material error, supposing, for argument's sake, that it is defective? Apply to it the test laid down by Van Santvoord. Had this defect any, the remotest, influence upon the judgment? Was the judgment obtained upon or by virtue of the original service? Clearly not. The defendant had the

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power and the right to stand upon his bill of exceptions, and had he done so, he would have had the full benefit of it; but he saw fit to come in voluntarily, and to do what, if the service was defective, we could not compel him to do—answer, get his case continued, to prepare for trial, and to enter upon, and go through, a full trial on the merits of his case; and he now seeks to reverse the whole case, and the judgment which his general appearance gave us, on the ground, that we did not, at a former term, bring him legally into court. Has he not had his day in court? Has he not had a fair trial? Was he forced into trial, without ample opportunity and time for preparation? These questions the record answers against him. But he insists, he was forced into court by the decision of the court below; that he was compelled to answer. How so? There is not power enough in all our judiciary, to compel a defendant in a civil cause, to answer plaintiff's petition. The decision was but an opinion of the court, subject to review here, and the defendant was no more bound to answer, in consequence, than he would have been, if the decision had never been made. All that he did, after taking his bill of exceptions, was purely voluntary; but, say his counsel, we were not bound to take the risk of an affirmance. We answer, if the decision was erroneous, defendant ran no risk. If it was correct, he had no right to refuse to answer, although he had the power. The fact of his refusing, or answering, could not change the law of service. Had he refused, the case would not have stood upon its merits, but on his exceptions; but he has voluntarily appeared and brought out the case upon its merits, and now, by every principle of justice, he should be compelled to abide the event.

Suppose the court establishes the practice as claimed by defendant, what will be the practical result? To accumulate costs upon the parties, and perpetuate useless and expensive litigation, and that is all. In this new country, where incapacity seems to be considered by some, the highest qualification for office; where more than one-half the returns and services, through the ignorance of officers, are defective;

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would not such a practice prove a stumbling block to justice? Suppose the opposite practice established, could it ever work injustice? Certainly not. If the party is surprised by the decision upon the service, he can continue his cause, if he needs time for preparation. If the decision is erroneous, it will be reversed, if he stands upon it. It was always the policy of the law to require matters, not to the merits, to be pleaded first, to save expense. In principle it is not just, that a defendant entice plaintiff into a trial of the merits, with its attendant expenses, and then fall back in the Supreme Court upon a prior step in the case.

But we are referred to several decisions of common law courts, to sustain the practice claimed by defendant. We admit, frankly, that the majority of the common law decisions are against us on this point, so far as we have examined them, although the only decision in our own state, seems to have established our practice as we claim it should be. *Switzer v. Gowdy*, Morris, 248. But we think we have already shown, that this court, under our system, is not bound by precedents in other states, in matters of practice, unless the decisions are based upon sound reason and justice. We insist, that our courts are entitled to the full benefit of the maxim, that "when the reason no longer exists, the rule ceases."

Why, then, did the courts of common law hold, that the defendant did not waive his right by afterwards pleading over? We answer, that the decision had its origin at a time when every defendant in a civil, as well as criminal case, was brought in on a *capias*. 3 Black. Com. chap. 19. Originally, the defendant was compelled into court by a gage of his property; if he did not then come in, a *capias* was issued, and the defendant pushed to outlawry, and in all the old writs, and in those of Vermont, until recently, and some other states at this day, the officer is ordered by the writ to have defendant's body before the court, &c. The appearance was compulsory, not voluntary; the defendant was in the custody of the law; and if he were compelled to stand upon his objection to the process, he must remain in

duress until the question was decided by the supreme or appellate court. He could not depart voluntarily, and leave the question to be decided afterwards; he must remain, but so remaining, the court heard the cause in full, and gave him the benefit of all his exceptions after judgment. This is evidently the view taken by the court in the case in *Morris*, where they say an appearance is not a waiver, when not voluntary. This reason was sound, and the rule just. A reference to the authorities against us will show that they trace directly through each other, back to the time when the *capias* was the process. But the reason for this rule no longer exists. No man can now be compelled to come into court, to answer a civil action. He may tell the sheriff what he pleases, and he can only be subjected to a charge of want of politeness. The writ of summons has, in the advance of jurisprudence, superseded the *capias*; and no man who appears and answers to a civil action, can be said to be in court by compulsion. Upon what ground, then, can the practice claimed by defendant be based? After service, whether defective or good, the defendant is either in court or not, by virtue of the service. If in court, well; if not, and he afterward answers, his appearance is purely voluntary; and it is a contradiction in terms, to say that he was compelled to answer, when there was no legal service on him, because the District Court erroneously decided that the service was sufficient. The question as to the sufficiency of the service, is of a fact in law, if we may use the term, which the decision of the court below, cannot vary. If he be not in court lawfully, by virtue of the service, he cannot answer, except voluntarily. We conclude, then, if the service was defective, his answer was, and must have been, voluntary, and he was voluntarily in court. Had he, however, been brought in, as at common law, by *capias*, then his appearance would have been compulsory, and his answer or plea compulsory also.

Let us view this question in another light, with reference to the common law cases. We take it to be well settled, that in civil actions, a party pleading over after the overruling of his demurrer, waives his demurrer. *Peck v.*

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Bogges, 1 Scam. 281; *Buckmaster v. Grundy*, Ib. 810; 2 Ib. 355; *Snyder v. Gaither*, 3 Ib. 91. Why have the courts so held, and yet decided that pleading over did not aid a defective service, when properly objected to? Clearly, upon the sole ground, that the demurrant had made an appearance, and was voluntarily in court; but in the case of defective service, defendant was considered as in court by compulsion. Had defendant, in both cases, been deemed voluntarily in court, we can perceive no good reason for holding a waiver in one case, and not in the other. The cases cited by defendant, then, are based upon the legal fiction, that defendant was in court by compulsion, and answered or pleaded by compulsion of court. Hence, after an erroneous decision that the service was sufficient, the defendant could not, if he saved the point, be considered as acting voluntarily, or waiving any of his rights, but as acting under duress. We conclude, that the reason for the common law rule, has ceased to exist, and that the rule should be abolished; that it cannot be sustained upon principle, and is utterly inconsistent with the spirit of our system of procedure and practice; and that no injurious result can follow its abrogation, while its establishment would entail protracted litigation, and great, and useless expense, upon the parties, and leave innocent persons to suffer for all technical mistakes of incompetent or blundering officials.

WOODWARD, J.—We think that the sheriff's return to the notice, was insufficient to place the defendant in court. The copies left at the place of business, and at the sleeping room of defendant, must go for nothing. It is very clear, that the law does not recognize any such mode of service. The place where the copy is left, must be returned by the sheriff as defendant's "usual place of residence," in which case, the copy must be left with some member of the family more than fourteen years of age. The return must further show, at whose house, and the name of the person with whom, the copy is left, or a sufficient reason must be given for the omission. The sheriff returns in this case, that he

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"left a copy with Mrs. Gay, at defendant's boarding-house, being the residence of E. E. Gay—the above-named Mrs. Gay being over fourteen years of age, and being a member of the family of E. E. Gay." This return is defective in not showing that the house of E. E. Gay was the usual place of residence of defendant, and that Mrs. Gay was a member of defendant's family. It is hardly necessary for us to point out that Mr. Gay's may have been his boarding-house, without being defendant's usual place of residence, and that Mrs. Gay may have been a member of the family of E. E. Gay, without being a member of the same family with defendant. We do not intend to determine here that the defendant must be the head of the family, with a member of which the copy is left, but only that they must be of the same family. The words "the family," in the statute, mean the family of which the defendant is a member.

The motion to set aside the proceedings having been overruled, the defendant appeared to the action, filed his answer, and the trial proceeded as though he was regularly brought into court. Has he, by such appearance, waived his right to question the correctness of the decision of the court on the motion to set aside the sheriff's return? It is claimed by defendant, that this right has not been waived, as his appearance was after the objection had been taken and overruled by the court; and that if the decision of the court was erroneous, he should not lose the benefit of his exceptions to it by an appearance which was the consequence of such erroneous decision, and which was in a manner enforced. The plaintiff, on the other hand, contends that the objection was waived by the appearance, and if not waived, that the error was of such a character that the substantial rights of defendant have not been prejudiced by it; and that he has had a fair trial on the merits, with full opportunity of making his defence.

There can be no question but that the doctrine is plainly laid down in decisions almost without number, that by appearance and pleading, defendant waives all defects in the process as well as in the service thereof. *Bell v. Pierson*,

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Morris, 28; *Hall v. Biever*, Morris, 113; *Rowley v. Stoddart*, 7 Johns. 207; *Pixley v. Winchell*, 7 Cowen, 366; *Knox v. Summers*, 3 Cranch, 496; *Buckingham v. McLean*, 13 How. 150. We find the doctrine laid down, as given in many of the earlier reported decisions, that when the defendant has appeared and is in court, there is an end of the mesne process. 3 Term Rep. 611; 1 Stra. 155. From this the courts have also inferred, that after the defendant has appeared, he cannot take advantage of any error in the process, or the service of it. *Fox v. Money*, 1 B & P. 250; *Davis v. Owen*, 1 Ib. 344. Hence, an application to set aside proceedings for irregularity, must be made as early as possible, and, as it is commonly said, in the first instance; and where there has been an irregularity, and the party overlooks it, and takes subsequent steps in the cause, he cannot afterwards revert back to the irregularity and object to it. *Pierson v. Rawlings*, 1 East, 77; *Diargent v. Vivant*, 1 Ib. 330; 1 Payne & Davies Practice, 366.

In *Diargent v. Vivant*, 1 East, 330, the defendant had put in special bail: on a rule to show cause why the bail bond should not be delivered up to be canceled, on account of a defect in the affidavit to hold to bail, Lord KENYON, C. J., held, that the affidavit to hold to bail, is process. Any irregularity in it must be taken advantage of in the first instance, and is waived where defendant voluntarily does any act submitting to such process, instead of taking steps to avail himself of the irregularity. Suffering the return term to pass, or putting in bail voluntarily, is a waiver. The court further say, that if defendant is under arrest, his consent to giving the bail bond, would not be binding on him, because it would be considered as given under duress. Where he voluntarily gives bail, it is a waiver of the irregularity in the affidavit. See also, *Norton v. Danvers*, 7 Durnford & East, 371. The doctrine that appearance and pleading cures all defects in the process and service, must be taken with some degree of qualification. It certainly cures all defects in the process, and the service, not objected to in proper time and manner. All irregularity in

judicial proceedings is waived by taking any subsequent step in the cause, without objection. In *Beecher v. James*, 2 Scam. 462, it is held, that a motion to quash an attachment must be made at the return term. By appearance and pleading, without motion to quash, the irregularity is waived. So in *Easton v. Altum*, 1 Scam. 250, it is held, that where the defendant appears, or is in court without objection, he waives all irregularities as to the mode the plaintiff has resorted to to compel his attendance. So also, in *Pearce v. Severn*, Ib. 269, where the process was irregular, the court held, that if no objection is made, the irregularity was waived; and that it was not like a case of defective jurisdiction over the subject matter, nor where jurisdiction is given to an inferior court, which must proceed in the manner pointed out by the statute, or its proceedings will be *coram non judice* and void.

If the defendant takes objections to the error or irregularity in the process or proceedings, in the first instance, and before he has appeared to the action, and the objection is overruled, does he waive the objection by taking any other step? The objection to the sheriff's return, in the present cause, was taken in the proper time and manner. It should have been sustained by the court, and the sheriff's return set aside. The District Court, however, decided the return to be "good, and sufficient to place the defendant in court, subject to plead." Now it was certainly within the choice of the defendant, to refuse to appear and plead to the action, and to suffer judgment to be rendered against him on the overruling his motion. By so doing, he could have tested in this court, the correctness of the decision; or, without submitting necessarily to the judgment against him, we are not prepared to decide, that he might not have taken an appeal to this court, from the judgment of the District Court on his motion, under sections 1557 and 1985 of the Code. But where the party, instead of suffering judgment on the overruling of the motion, as in this case, fully appears to the action, and a trial is had, a question is raised for our consideration, for which, we confess, we have found

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no very ready solution in any of the adjudicated cases to which we have had access. The service on defendant was clearly insufficient. It was an irregularity or defect which would not, however, have caused a dismissal of the suit. The only result of granting the defendant's motion, would have been a continuance of the cause, until defendant could have been properly served, and placed within the jurisdiction of the court. Does, then, the appearance and pleading obviate the objection? Or, shall defendant, even after trial and judgment against him, be permitted in this court, to go back to the decision of the court on the motion to set aside the sheriff's return? It would seem from the case of *Hussey v. Wilson*, 5 Durnford & East, 254, that where there is a radical defect in the proceedings to hold to bail, it will not be considered as waived by the defendant putting in bail, before taking exception to the defect. The court held, that there is a clear distinction between a mere irregularity in the mode and time of proceeding, and a complete defect in the proceedings themselves. The affidavit which was the foundation of the proceedings, being defective, the bail bond was ordered to be canceled. Where an objection is taken, which would be fatal to the proceedings, and for which they should be dismissed, and it is overruled by the court, and the defendant afterwards appears and pleads to the suit, it would seem that the objection is not waived by the subsequent appearance. To this effect, is the case of *Secrest v. Arnett*, 5 Blackford, 366, cited by appellant's counsel. In an action before a justice of the peace, defendant moved to dismiss the suit, because the christian names of defendants were not stated in the writ. The motion was overruled. The plaintiffs then filed their declaration, stating their christian names. The defendant pleaded to the action, and on trial, judgment was rendered for the plaintiffs. The Circuit Court, on motion, dismissed the suit, for the reason urged by defendant before the justice. On error to the Supreme Court, the plaintiffs contended that the defect in the writ was cured by the plea before the justice. BLACKFORD, J., says: "We do not think so. The objection to the writ was made and overruled

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before the appearance and plea to the suit. There was, therefore, no waiver of the objection." In *Wheeler v. Lampman*, 14 Johnson, 481, the summons was served on defendant by a constable, in an action before a justice of the peace. The return did not show the date of the service, as required by the law of New York. The defendant appeared, and objected to the return. The objection was overruled by the justice, who decided that the return was sufficient. Issue was then joined, and judgment was rendered for the plaintiff. The Supreme Court held, that the appearance of the defendant in the justice's court, merely for the purpose of objecting to the constable's return, was not a waiver of the irregularity of the return. The law was peremptory that the time when the summons is served, shall be returned thereupon, and its injunctions must be obeyed. The court further says: "If the defendant had waived the irregularity, by pleading to the declaration, without objecting to the return, it would have been too late to make the objection now. In *Shannon v. Comstock*, 21 Wendell, 457, the defendants were arrested on a warrant, issued in a suit before a justice of the peace, on an affidavit that they were non-residents of the state. On being brought before the justice, before pleading to the action, they moved to quash the proceedings, on the ground that they were residents of the city of New York, and not liable to arrest by warrant. The plaintiff, for the purpose of the motion, admitted that the defendants were residents of the county in which the suit was brought. The justice refused to grant the motion. After plea in abatement overruled, defendants pleaded the general issue, and on trial, judgment was rendered for plaintiff. The Supreme Court held, that the proceedings should have been set aside for irregularity, and that it was no answer that defendants finally pleaded in bar. "Such an answer," they say, "must rest on the ground of voluntary waiver. In this case, the propriety of the arrest was questioned at once, on admitted facts, and defendants, being in custody, were compelled to plead over." In the case of *Wheeler v. Lampman*, though it does not seem clear to us, that the objection taken to the officer's

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return, was such a one as ought to have been fatal to the suit, yet the court hold, that the statute is peremptory in requiring the time of the service to be indorsed on the summons. The failure of the constable to state the time in his return, was at all events, such a defect, that the appearance and pleading by defendant, did not supply its place, or amount to a waiver of it. In the case of *Secrest v. Arnett*, and of *Shannon v. Comstock*, the defects in the proceedings were such as the court adjudged fatal, and sufficient to cause the dismissal of the suits. They would have been considered as waived, if the parties had appeared and pleaded, without making objection to them.

The case of *Switzer v. Gowdy*, Morris, 248, was an action of trespass, commenced in Linn county, in which a capias was issued to Cedar county, and defendant arrested there. The defendant appeared by attorney, and moved to quash the writ. The court overruled the motion. The defendant then pleaded not guilty, and afterwards withdrew his plea, and by agreement of counsel, submitted to judgment, with stay of execution. There was an entry that defendant waived no error by the agreement, and that plaintiff, at the time, denied his right to make the reservation. The court, not being unanimous, and expressing no opinion as to whether the writ should have been quashed, were all of opinion, that admitting the defendant was wrongly arrested, the error was cured by the agreement entered into by the parties by their attorneys. They further say: "Had the suit been commenced by summons, his appearance alone would have been a waiver of all antecedent objections. Such, however, is not the case where the appearance is not voluntary. Here the defendant not only appeared by his counsel, but gave his consent, through the same medium, that the judgment, for a specified amount, should be rendered against him. This cures all defects and irregularities in the previous proceedings." It will be perceived, that the court base their decision on the agreement, and not on the appearance of defendant, after his objection to the writ.

We have sought for some general rule or principle, on

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which the cases above cited, have been determined, which will be equally applicable to the one under consideration. It will be seen that the rule is incorrect, as laid down in its broadest terms, that appearance and pleading cures all irregularities of process. Objections taken in proper time and manner, to the process and its service, are not waived by pleading or taking subsequent steps in the cause. And where the defect is in the proceedings themselves, it is not waived by taking such subsequent steps; and the objection has been held good, when made after appearance. After the best consideration we have been able to give to the subject, we are inclined to hold, that the defendant, having taken objection to the defective service of process in the proper time and manner, and his objection having been erroneously overruled by the court, and he required to plead to the action, did not waive or lose the benefit of his objection, by appearing and pleading. Although defendant appeared and filed his answer to the petition in the District Court, yet such appearance must be considered to have been made under protest, and subject to the exception taken to the decision of the court, on the motion to set aside the return. The appearance will not be considered voluntary, where it has been made in consequence of, or in obedience to, an erroneous decision of the court, on so material and important question, as whether a party defendant has been properly served with notice of suit, and his person brought within its jurisdiction. An appearance has been held, not to supply the lack of the Christian names of the plaintiffs in the writ. 5 Blackford, 366. It has been held, that it did not supply the lack of a proper date to the constable's return, (14 Johns. 481;) and that it did not render defendants liable to arrest as non-residents, who were admitted residents of the county in which the suit was brought. 21 Wendell, 457. So, we think, in this case, that the appearance and pleading could not be effectually urged against a party, who has resisted its jurisdiction in the proper manner and at the proper time. The service of notice, under our practice, stands instead of the arrest of the body, under the common

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law; and it was never held, that a defendant, by appearing, waived the irregularity of the process or arrest, if objection was taken in time. If the defendant has been illegally arrested, as by breaking open the door of his dwelling, the court may discharge him from custody. *Lee v. Gansel*, 1 Cowp. 9.

A majority of the court are of the opinion, nevertheless, that the defendant cannot assign this ruling of the court, as an error, in view of the actual history and state of the cause. It is true that this is a jurisdictional matter, but it is to be remembered that service, under our law, is only to give a party notice, and the legal time to prepare for trial; and that it is not, in all respects, and in all its incidents, equivalent to the former arrest of the body; and, also, that if the service had been held insufficient by the court below, this would not have led to a dismissal of the cause, but only to a continuance, for a new service. Now, at that term, which was the first term, the defendant's counsel applied for, and obtained a continuance. And, at the second term, the cause was again continued, in order to obtain the sworn replication of the plaintiff, which was called for by the defendant; so that the latter party had, to prepare for trial, more than all the time which he would have obtained ordinarily, had the service been held insufficient. If the defendant had been driven into a trial at the first term, and verdict and judgment had been against him, we think, he would have been authorized to make the objection in this court; for then he would have stood in the position of having made his objection in proper time and manner, and of being driven into a trial, without the legal opportunity for preparation. But to permit the party to take the objection now, after he has had all the time, and all the opportunity, which he would have had by granting his motion—after a full and fair trial, under ample time for preparation—would bring a reproach upon the law which would be richly merited. The case comes within that class, in which it is often held, that an error which works no injury, shall not vitiate. Whatever slight departure there may be in this view from strict

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logical or legal reasoning, it is compensated by the above considerations; that the cause has been pending some three or four terms; that it was twice continued, and once on defendant's motion; that he has had all the time for preparation, that he could have gained in any other manner; and thus that he cannot claim to have suffered injury by being pressed into a trial, without legal notice. Under these circumstances, it seems to a majority of the court, to be an abuse of the law, to reverse all that has been done, and send the parties back to commence again, and travel over the same ground.

The remaining error assigned, arises on the following circumstances: The defendant objected to the note offered, being permitted to go before the jury as evidence. The objection was, that there was a variance between that declared on and that offered—the variance existing in the date of the note. Upon this question, whether there was a variance, and whether the note should be shown as evidence to the jury, the plaintiff called the defendant himself, to testify. The witness being turned over to the defendant's counsel, he inquired as to the consideration, and as to his defence to it, and claimed that his answer should go to the jury. The plaintiff objecting, the court sustained the objection. In this, there was no error. The inquiry upon which the defendant was introduced as a witness, was before the court only, and was a preliminary question, whether the note could be offered in evidence. The judgment of the District Court is affirmed.

WRIGHT, C. J.—I desire to say, that I think the service upon the defendant was clearly defective, for the reasons stated in the foregoing opinion, but hold that by pleading over and going to trial, he waived the right to afterwards object to the sufficiency of such service. To place this part of the case upon this simple, broad ground, would be to me more satisfactory, than to have the decision turn upon what afterwards, through several terms, transpired in this particular case. I am clearly of the opinion, that under our

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law and system of practice, as recognized by our earliest and latest decisions, the defendant, if he would ask the decision of this court upon such a question, must stand upon his motion, and leave the plaintiff to take his own course in the cause; and that by pleading over, he waives the objection, whether the trial is at the same or a subsequent term. He is not compelled to plead over, or make any further appearance. If he does so, however, he thus voluntarily submits to the jurisdiction, and his right to complain of the decision on his motion, is, by that act, as completely taken away, as it is by any number of after continuances, motions, or trials. *Hotchkiss v. Thompson*, Morris, 156; *Harmon v. Chandler*, 3 Iowa, 151; *Mitchell v. Wiscotta Land Co.*, Ib. 210. And, entertaining this opinion, I, of course, have no difficulty in concurring in the view taken, that after repeated continuances, and after the defendant has had ample time to prepare his defence, he should not be permitted to now claim that he was not properly in court. If one forward step, after the overruling of his motion, would operate as a waiver, then, quite clearly, would several such steps, running through after terms of the court, as shown in the history of this cause.

4	180
114	81
4	180
121	70
121	88
4	180
130	439

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In the construction of a will, the intention of the testator is the first consideration; and in ascertaining that intention, the whole context of the will, is to be taken together.

Where a testator devised as follows: "In view of the goodness of Almighty God, in blessing me with a competency of this world's goods, and the privileges and advantages of Christianity and the Church; and having on a former occasion, conveyed by deed to the board of trustees appointed for that purpose, one acre and a half of land out of the northwest corner, (next the school-house lot,) of the southwest quarter of section No. three, of township sixty-nine, range nine, for the purpose of laying aside as a grave-yard, and upon which a house of worship for the use of the Methodist Episcopal Church, should be built. Now, for the purpose of further assisting in carrying out

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the design aforesaid, I give and bequeath to the Methodist Episcopal Church, all the residue of my real estate not above disposed of, or the proceeds thereof, to be used and disposed of, as follows: The trustees above referred to, to wit: (naming five persons,) and their successors in office, to take charge of the said devise, bequest, or legacy, and to invest the same in such manner, as will appear to them the most productive and safe, and the proceeds, dividends and interest thereof, to be applied by them and their successors in office, as follows: *Item* 1. Five dollars, to be paid annually to the missionary cause of the Methodist Episcopal Church; *Item* 2. Five dollars, to be paid annually for the support of the preacher or preachers on this circuit, including the premises above named, and which will hereafter be more fully stated; *Item* 3. The balance of the interest or dividend to be applied towards the erecting, finishing, repairing, &c., of the house of worship to be built on the lot above named of one and one-half acres, conveyed to said trustees and their successors in office, for the use of the M. E. Church as aforesaid; and if said interest or dividends, or proceeds of the same, shall not be all needed for the use of building, repairing, &c., then the balance to be appropriated towards paying the minister or ministers of the Methodist Episcopal Church, whose circuit, or place of labor, or station, may include the meeting-house intended to be built on the lot above named and conveyed;" and where certain of the heirs of the testator, filed their bill in Chancery, claiming that the devise was void, and passed no title in the land devised to the Methodist Episcopal Church, or the trustees thereof; and praying that the trustees may be enjoined from selling or incumbering the real estate, and that the title of the complainants and other heirs, may be quieted and set at rest; and where the trustees of the Methodist Episcopal Church, (one of whom was executor of the said will,) answered, setting up the organization of the said Church, and its objects and purposes; that the testator was a member of said Church, and belonged to the Union Class, on the Winchester Circuit, under the jurisdiction of the Iowa Yearly Conference; that said Union Class purchased the lot specified in said devise; and that since the death of the said testator, the members of said Church, composing said Union Class, have been constituted a corporate body under the laws of Iowa, and before the commencement of the suit, had accepted the said devise, &c.; and where the answer was demurred to, which demurrer was overruled by the court.

- Held*, 1. That as a portion of the property devised, was intended by the testator to be a perpetual fund, for raising the sums directed to be applied annually, to the support of the missions of the Methodist Episcopal Church, and for the payment of the minister on the Winchester Circuit, so much thereof as might be necessary for these purposes, must be administered by trustees; and the Church, being an unincorporated society, could not execute the trust.
2. That what was given for immediate expenditure, in erecting and finishing the church building contemplated by the testator, was a good devise to, and might be taken by, the Church, in its own name.
3. That if no other direction were given by the will, there could be no valid objections to decreeing the money to be paid to the person who ordinarily

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receives and keeps the funds of the Church, or to its treasurer for the time being.

4. That the legal title to the property devised, vested in the trustees named in the will, for the use of the Church; and that it was not the intention of the testator, to give a fee simple estate in the lands to the Methodist Episcopal Church.

Where property is devised to a charitable use, consistent with law and public policy, and the object is specific, and capable of being carried into effect according to the intention of the donor, and even though no trustees are appointed, and the object of the testator's bounty is incapable of taking the legal title, the terms of the will create a trust in the property in the hands of the heirs of the testator.

Appeal from the Van Buren District Court.

IN March, 1852, George Miller made his last will and testament in writing, in which, after making some small bequests to his children, and giving all his household and kitchen furniture, and one-third of his personal estate, to his wife, he made the following disposition of his real estate:

"5. I give and devise to my said wife, Nancy Miller, the one third part of all my real estate, lands and tenements, either by division, if she should desire it, if it can be done equitably, to herself and the lands, or the one third of the proceeds of the value thereof.

"6. In view of the goodness of Almighty God, in blessing me with a competency of this world's goods, and the privileges and advantages of Christianity and the Church; and having, on a former occasion, conveyed by deed, to the board of trustees appointed for that purpose, one acre and a half of land out of the northwest corner, (next to the school-house lot,) of the southwest quarter of section number three, of township sixty-nine, range nine, for the purpose of laying aside as a grave-yard, and upon which a house of worship, for the use of the Methodist Episcopal Church, should be built. Now, for the purpose of further assisting in carrying out the design aforesaid, I give and bequeath to the Methodist Episcopal Church, all the residue of my real estate not above disposed of, or the proceeds thereof, to be used and

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disposed of as follows: The trustees above referred to, to wit, J. W. McManaman, George Cupp, Aaron White, E. Mayne and Frederic Zollers, and their successors in office, to take charge of the said devise, bequest, or legacy, and to invest the same in such manner as will appear to them the most productive and safe, and the proceeds, dividends, and interest thereof, to be applied by them and their successors in office, as follows:

"Item 1. Five dollars, to be paid annually to the missionary cause of the Methodist Episcopal Church.

"Item 2. Five dollars, to be paid annually, for the support of the preacher or preachers on this circuit, including the premises above named, and which will hereafter be more fully stated.

"Item 3. The balance of the interest or dividend, to be applied towards the erecting, furnishing, repairing, &c., of the house of worship, to be built on the lot above named, of one and one-half acres, conveyed to said trustees and their successors in office, for the use of the M. E. Church as aforesaid; and if said interest or dividends, or proceeds of the same, shall not be all needed for the use of building, repairing, &c., then the balance to be appropriated towards paying the minister or ministers of the Methodist Episcopal Church, whose circuit or place of labor, or station, may include the meeting-house intended to be built on the lot above named and conveyed."

Miller, the testator, died in 1855, and in May, of that year, the will was proved and admitted to record in the county court, and probate thereof granted to George Cupp, one of the executors therein named. McManaman, the other executor named, having previously departed this life. At the time of his decease, Miller was seized of 320 acres of land in Van Buren county, the same devised by his will. He left thirteen heirs.

The complainants, representing the interests of five of these heirs, and having, since the admission of the will to probate, purchased the interest of Nancy Miller, the widow, in the land, in August, 1855, filed this bill, claiming that

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the will of their ancestor, so far as it attempts to devise the land or its proceeds, to the Methodist Episcopal Church, is void and passes no title, and urging the following reasons, among others, why the devise is inoperative:

First. That at the time of the execution of the will, and at the death of the testator, the said Methodist Episcopal Church was not capable of taking by that name and style, the real estate devised to it; and that it could, as such church, neither sue nor be sued, and could neither purchase, sell, nor convey real estate, and could only take through its trustees, by devise to them and their successors in office.

Second. That the persons appointed to receive the real estate or the proceeds thereof, were not the trustees of the church; and that they had no lawful organization, and were only named as trustees by the testator, and had no successors.

Third. That the devise to the church was procured by undue influence over the mind of the testator, by the persons named as trustees, and by false and fraudulent representations to him, as to the feelings entertained towards him by his children and heirs; and that whilst old and feeble, and laboring under deception produced by such false representations, he made his will devising his real estate to said church.

The complainants show by their petition, that the said Cupp, as executor, and the said Mayne and others, as trustees, are claiming the interest in said real estate devised to said church; and that said executor is proposing to sell and dispose of the same, and to invest the proceeds for the purposes named in the will. They make the executor and trustees, and the Methodist Episcopal Church, parties defendants, and pray that the said executor may be enjoined from selling, or in any manner incumbering said real estate; that the devise to the church may be declared void; and that the title of complainants and the other heirs to the same, may be quieted and set at rest. A demurrer to the petition by the defendants, was overruled by the court.

The executor and the trustees then filed their answer, in

which, admitting the other formal matters set up in the petition, as to the will and the propate thereof, they expressly deny that the devise to the church, was induced by any undue or controlling influence over the mind or will of the testator, by defendants or any other persons, or that defendants made any false or fraudulent representations to him, as to the feelings, friendly or otherwise, entertained towards him by complainants, or by any of his children ; or that, at the time of making said will, he was frail of body or mind, or laboring under the influence of any false representations whatever. And as trustees for the Methodist Episcopal Church, they answer further, showing the organization of said church in the United States, in 1784, and its continued existence since, as a religious and charitable association, composed, for the more convenient and efficient carrying out of its proper work and objects, of annnal conferences, districts, and circuits or stations ; that the members of the society embraced within each circuit or station, are subdivided into smaller companies, called classes, according to their respective places of above, consisting of twelve or more persons ; that Miller, the testator, at the time of his death, was a member of the Methodist Episcopal Church, and belonged to the Union Class on the Winchester Circuit, under the jurisdiction of the Iowa Yearly Conference ; that the Winchester Circuit embraced all the members of said church, residing in a certain territory of the northern portion of Van Buren county, Iowa ; and the said Union Class, a subdivision of said circuit, embraced all the members of said church within the locality where the said George Miller resided ; that the said defendants, and the said McManaman, now deceased, were also members of said church, belonging to said class ; that with a view to secure to themselves and the members of said church at large, a place of worship, for hearing the preaching of the gospel, by such minister or ministers of the Methodist Episcopal Church, as should from year to year be appointed by the Iowa Annual Conference, to have the supervision of the said circuit, they, together with the other members of the said Union Class, purchased

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of the said George Miller, one and a half acres of land, within the locality where the members of said class resided, whereon to erect a church; that the conveyance was made to defendants and said McManaman, as trustees, and the title is held by them as the title of all the property of said church, dedicated to religious purposes, is held, viz: in trust for the whole church; that the said conveyance is the same referred to by said George Miller in his will; that the title of all church property is held by trustees, members of the church, appointed by the preacher in charge of the circuit; and that provision is made in said conveyance, and by the rules and discipline of the church, for filling any vacancy that may occur in the body of the trustees. They further show, that the said George Miller, before making his will, had made liberal provision for his children, and had done what he considered and expressed, was a father's part by them, in dividing a considerable estate between them; that the land devised to defendants, had for many years before his death, been intended by him for the purposes expressed in his will; and that it should be dedicated to the uses aforesaid, was the treasured wish of his heart. They claim that there is no uncertainty, as to the place where the said church building is to be erected, nor as to the purposes for which the said devise of the testator was intended; that there can be no failure of the beneficiaries intended to be the recipients of the testator's bounty; that the said church in its organization, is a missionary society, and embraces in its objects, the preaching and distributing the word of God, in foreign and heathen lands, and in the remote and sparsely settled districts of our own country; that the support of missions is committed to each society and congregation, as such; that annual collections are required to be made by the preacher appointed to each circuit, in every class and congregation, and the moneys so collected and received, amounting to a large sum, are by the authorities of the church, devoted to the missionary objects above stated; and that according to the constitution and organization of the church, the annual appointment of a minister of said church to said circuit, em-

bracing the locality, where said testator resided, and where said house of worship is to be built, is as certain as any future human event can be. They claim that there are no other trustees of said church than themselves; that the testator intended that the legal title of said real estate, should be vested in them as trustees, for the use and purposes set forth in his will; and that they, and the members of the church on said circuit, at the place designated, are the beneficiaries under said devise; that they are many in number; and that the said building is much needed. They further show, that since the death of said George Miller, the members of the said Methodist Episcopal Church, have been constituted and organized under the statute, a body corporate, with power to buy, receive, hold and sell real estate; and before the commencement of this suit, had accepted the devise made by the will of the said George Miller, with the view of carrying out the objects of the same. They accordingly ask, that if they are not, by virtue of the will aforesaid, and their incorporation aforesaid, invested with the legal title of said real estate, for the trusts mentioned in the will, that the said real estate may still be charged with the charitable uses contained in said will; and that they, by the appointment of the court, as the trustees of the said church, may be authorized to carry out and complete the intentions of the testator. The defendants exhibit the deed to them as trustees, by said Miller, for the one and a half acres of land for the site of said church; and the articles of incorporation, whereby the members of said church had been constituted a body corporate, by the name of the "Trustees of the Methodist Episcopal Church, Union Society, Winchester Circuit, Iowa Annual Conference," with power to take and hold property for the uses of the church, according to the usages thereof.

The complainants filed a demurrer, to so much of the answer as sets forth the organization and constitution of the Methodist Episcopal Church; that the Winchester Circuit was a branch of such church; that the Union Class or Society, to which the said George Miller, as a member of the

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church, belonged, was within the bounds of said circuit; and that a lot of ground had been purchased by said trustees of the testator, on which to erect a church building; and that the said trustees had since been constituted a body corporate, and for causes of demurrer, assigned the following: 1. That said Methodist Episcopal Church is not shown to be a corporation, that could take by devise or grant. 2. That said Winchester Circuit, nor said Union Class, is not shown to be a corporation that could take by devise. 3. That the devise was to the Methodist Episcopal Church, and not to said Union Class or Society. 4. That said incorporation was organized since the death of said George Miller; that it cannot take by devise; and that the devise in the will was to the Methodist Episcopal Church, and not to said defendants as trustees, nor to said incorporation. The demurrer was overruled, and from the judgment of the court overruling the demurrer, the complainants appeal.

Knapp & Caldwell, for the appellants.

Charles C. Nourse, for the appellees, made the following points:

1. This is a devise to the trustees, in trust for the church. The court will not give to the words used, a strict legal construction, where it is in manifest violation of the will, as manifested by the subsequent part of the will, or the context. *De Kay v. Irving*, 5 Denio, 646.

2. This is a devise of personal property. What is directed to be done will, in equity, be considered as done. A devise of money, to be invested as real estate, is a devise of real estate, and *vice versa*. Story's Equity.

3. Dedications for public uses, and bequests for charitable uses, will be sustained by a court of equity, without a trustee. The heir will be charged with the execution of the trust, or the court will appoint trustees.

In support of which, he cited the following authorities: 6 Peters, 432; 3 Ib. 120; 2 Ib. 566; 9 Howard, 55; *Vidal v. Girard's Ex.*, 2 How. 128; 6 Ohio, 129; 9 Ib. 203; 11

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Serg. & R. 88; 7 Smedes & M. 663; 6 Paige, 640; 7 Johns. Ch. 292; 9 Cowen, 437; 4 Iredell, 19; 4 Georgia, 404; 7 Vermt. 241; 4 Dana, 354; 15 Maine, 414; 7 Paige, 77; 4 Barb. 404; 9 Ib. 324.

STOCKTÖN, J.—As the argument for the appellants, is chiefly based on the alleged incapacity of the Methodist Episcopal Church to take the estate devised, we shall, in the first place, briefly examine that question. It is claimed that the devise is void, and that the estate descended to the heirs, not for the want of, or uncertainty as to the, beneficiaries; nor because the object of the charity was unlawful; but because the church, not being incorporated, is incapable of taking the trust as a society.

The authorities maintaining this doctrine, are of high respectability. Among those, in which it has been held that such a devise is void, may be mentioned, *The Baptist Association v. Hart's Exrs.*, 4 Wheaton, 1, and *King v. Rundle*, 15 Barb. 139. In the first-named case, the bequest was "to the Baptist Association that for ordinary meets in Philadelphia, to be a perpetual fund for the education of youths of the Baptist denomination who shall appear promising for the ministry." The bequest was held, not only to be void at law, but one that could not be sustained by virtue of those rules by which a court of chancery, exercising its ordinary powers, is governed. In *King v. Rundle*, charitable bequests were made to several religious bodies, and the remainder devised to the Protestant Episcopal Society, for certain purposes. The bequests to the religious bodies, and the remainder over, were held void. The distinction must be borne in mind, however, as to the power of the chancellor to enforce a charitable trust, which was either illegal, or void for indefiniteness, or vague generality, and such as are only void at law, but which will be protected and enforced in equity. In *McCord v. Ochiltree*, 8 Blackford, 16, the bequest was to "the Theological Seminary at South Hanover, in the state of Indiana, all the remainder of my estate, to continue a permanent fund, and the interest to be applied

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to the education of pious, indigent youths, who are preparing themselves for the ministry of the gospel, and those only who strictly adhere to the Westminster Confession of Faith, in its literal meaning." This bequest was held to be void at law, for the reason that the Theological Seminary was at the time, an unincorporated society, and could not execute a trust of that character, for want of succession; and because the objects of the testator's benevolence were too vaguely indicated, to be enabled to take the legacy, without the interposition of a trustee. The bequest, though void at law, was enforced in equity, as a charity, both in reference to the statute of 43 Elizabeth, chapter 4, and to the law of charities, independent of that statute.

The case of *Burr's Exrs. v. Smith*, 7 Vermont, 241, was a bill in Chancery by the executors of the testator, in which the different parties claiming legacies under the will of Joseph Burr, were brought before the court, in order to the determination of the question, whether legacies to certain charitable associations, to wit: The American Bible Society, the American Colonization Society, the American Tract Society, and others of like character, should be paid. The legacies were all to the treasurers for the time being, of voluntary associations unincorporated. The will was sustained, and the legacies ordered to be paid. The court say: "Societies, or bodies of men unincorporated, have ever been considered at common law, capable of receiving gifts or legacies, to be applied to charitable uses," and "the want of a charter of incorporation, was no impediment to a body of men, changing from time to time, from receiving and distributing, according to the intent of the donor, money or other property, given or granted for a charitable use." In the same case, we find a reference to the opinion of Judge BALDWIN, in the case of *Magill v. Brown*, decided in the United States Circuit Court for Pennsylvania, upon the subject of charitable uses, arising under the will of Sarah Zane. We do not find any full report of the case, but it is referred to, and its substance stated, in so many instances, that we think we are justified in citing it, without any apprehension

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of a mistake as to its purport. Certain bequests were made by the will of Sarah Zane, to the Yearly Meeting of Friends in Philadelphia, an unincorporated association for purposes of general and indefinite charity. These, as well as other bequests of a kindred nature, were held to be good and valid. Religious and charitable, though voluntary associations, were shown, in accordance with the doctrines of the state courts of Pennsylvania, to be capable of holding property, for pious and charitable uses; and as to such purposes, they were to be deemed incorporated. Judge BALDWIN remarks, that "the common law requires no charter, to enable a body of men to purchase chattels, or receive donations of money, a chattel interest, or an estate for the life of the grantee in land, by their name as a body, without other words." 7 Vermont, 279, 316; 2 Howard, 197; 17 Howard, 390. An act of incorporation may be necessary to enable them to have perpetual succession, or to receive and hold goods or personal property in succession. The court say, however, in *Burr v. Smith, supra*, "that a decision, that a company of individuals are incapable of receiving gifts for a public or charitable purpose, or that such a society should not be protected in the enjoyment of property given to them, would be at variance with all their received ideas, and the establishment of the state, and directly at war with the principles of religious freedom. And herein they make no distinction between protecting them in the enjoyment of property actually in possession by gift, and enabling them to recover what is bequeathed to them, by will. 7 Vermont, 280. The case of the *Baptist Association v. Hart's Exrs.*, so far as it decided that a court of chancery had no power to execute a charity void at law, independently of the statute of 43 Elizabeth, chapter 4, was overruled by the case of *Vidal v. Girard's Exrs.*, 2 How. 127, in which it was held, that there is an inherent jurisdiction in equity, in cases of charity, and that charity is one of those objects, for which a court of equity has, at all times, interfered to make good that which, at law, was an illegal and informal gift; and that cases of charity, in courts of equity in England, were valid,

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independently of, and previous to, the statute of Elizabeth. 2 Howard, 195. See also, 8 Blackford, 23; *Potter v. Chapin*, 6 Paige, 649; *Bartlett v. Nye, &c.*, 4 Metcalf, 380. In *Potter v. Chapin*, Chancellor WALWORTH says: "Although some doubt was thrown upon the question of charitable donations, for the benefit of a community or body not incorporate, so as to be capable of taking and conveying the legal title of property, by the decision of the Supreme Court of the United States, in the case of the *Baptist Association v. Hart's Exrs.*, I believe it is generally admitted, that the decision in that case was wrong. And it may now be considered as an established principle of American law, that the Court of Chancery will sustain and protect, such a gift, bequest, or dedication of property, to public or charitable uses, provided the same is consistent with local laws and public policy, where the object of the gift or dedication is specific, and capable of being carried into effect according to the intention of the donor."

Our conclusion from these authorities is, that as a portion of the property devised in this instance, was intended by the testator, to be a perpetual fund, for raising the sums directed to be applied annually to the support of the missions of said church, and for the payment of the minister on said Winchester Circuit, so much thereof as may be sufficient for these purposes, must be administered by trustees; and the church, as a society unincorporated, could not execute the trust. But what is given for immediate expenditure, in erecting and finishing the church building, contemplated by the testator, would be a good devise to, and might be taken by, the church, in its own name. And, if no other direction were given by the will, there could be no valid objections, to decreeing the money to be paid to the one who ordinarily receives and keeps the funds of the church, or to its treasurer for the time being. *Burr v. Smith*, 7 Vermont, 311; *Walker v. Childs*, Ambler, 524.

We next advert to the will of the decedent, in order to ascertain in whom the legal title of the estate devised, is vested by that instrument. In arriving at a true construc-

tion, the intention of the testator is the first consideration, and the whole context of the will is to be taken together. From the language, "I give and bequeath to the Methodist Episcopal Church, all the residue of my real estate not above disposed of, or the proceeds thereof," separated from any other portion of the will, it might readily be inferred, that the testator intended to devise the real estate, so that the church should take the fee. But the inquiry is immediately suggested: Why, if such was his intention, should he direct that the defendants, Mayne and others, take charge of the devise, and invest the same in the safest and most productive manner, and apply the proceeds as by him further directed? Does this not look, as if it was his intention to vest the legal title in the trustee? There is an evident conflict, if we suppose it to have been his intention to vest the title to the estate in the church, in directing another body to take charge of it, and invest and disburse the proceeds. We have not been able to arrive at the conclusion that it was the intention of the testator, to give a fee simple estate in the lands to the Methodist Episcopal Church. On the contrary, we think it is clearly to be gathered from the language of the will, that such was not his intention. He speaks of having already conveyed one and a half acres of land to the board of trustees, the defendants in this suit, upon which a house of worship, for the use of the Methodist Episcopal Church was to be erected; and in the language of the will, "for the purpose of further assisting in carrying out the design aforesaid," he devises the residue of his real estate to the church, to be used and disposed of, as follows: "The trustees above referred to, and their successors in office," [giving the names of defendants,] "to take charge of the said devise, bequest, or legacy, and to invest the same in such manner as will appear to them the most productive and safe, and the proceeds, dividends, and interest thereof, to be applied by them and their successors in office, &c." We think it may fairly be inferred from this language, that the testator devised, and intended to vest, the legal title in the trustees named in his will, for the use of the church, and for further

assisting in carrying out the design of erecting the house of worship referred to, on the land before conveyed by him to the same trustees. Such, in our opinion, being his intention, it is to be respected by us, and as far as possible, and consistent with right, it is to govern.

If the language used by the testator in the several clauses of his will, is such as to give to the M. E. Church, and to the trustees, the defendants, respectively the fee simple title to the land, so far as the claims are irreconcilable, the latter must prevail—the first deed, and the last will, being always entitled to take place. 2 Roper on Legacies, 328; Preston on Legacies, 236; *Sims v. Doughty*, 5 Ves. 243; *Doe v. Leicester*, 2 Saunton, 109. In *Boyd v. Talbott*, 12 Ohio, 212, the will of Boyd gave all his estate, real and personal, and all moneys and proceeds arising from the same, and all moneys remaining after the payment of debts, to his wife, for the support of herself and family. He directed what remained of his property, after his wife's death, to be divided among his children by his executors. He further directs his executors to lease the premises, and after paying the ground rents and taxes, to pay the proceeds to his wife. The court say, in reference to the legal title: "The first clause standing alone, would invest the wife with the title. But the power to lease, in the clause last cited, coupled with the burden of paying taxes and ground rents, implies a larger interest than a mere naked power. The intention of the testator was, not to limit an estate to the wife, but an interest in the proceeds. The title of the land, then, is found in the executors of Boyd." To the same purport, is the case of *How v. Fuller, &c.*, 19 Ohio, 51. We are of opinion, therefore, that the trustees named in the will, took the legal title to the real estate devised, to the use of the Methodist Episcopal Church.

The position assumed by the complainants, that if an estate is devised to a church or society incapable of taking the legal title, the devise is void, and the estate so devised descends to the heirs, unincumbered, cannot receive our sanction. The property, in this instance, is given to a

charitable use, in every respect consistent with our laws and public policy. The object is specific and capable of being carried into effect, according to the intention of the donor. Such being the case, even though no trustees were interposed, and the church were incapable of taking the legal estate, the terms of the will create a trust in the property in the hands of the heirs of Miller, the testator. In *McCurtee v. Orphan Asylum Society*, 9 Cowen, 484, JONES, Chancellor, says: "It is the settled doctrine of the court, in the construction of wills, and the administration of trusts, that a trust shall never be permitted to fail, through the failure or disability of the trustee to execute the trust; but shall be supported upon the intention of the testator; that the trust is attached and fastened to the land; and that the land remains chargeable with it, in the hands of the heirs or devisee. *Burr v. Smith*, 7 Vermont, 307; Willard's Eq. 580. So in Ohio. If the bequest sufficiently defines the trust, though it may be inefficacious to pass the legal title, the heir is charged with its performance. *McIntyre's Poor School v. Zanesville Canal and Manufacturing Company*, 9 Ohio, 287.

In *Bartlett v. Nye*, 4 Metcalf, 378, the testator had devised real estate to the American Bible Society. The heirs claimed the estate, on the ground that the devise was void, the society being unincorporated. It was held by the court, that a valid trust having been created by the will, the heir will become the trustee of those for whose use the donation is intended, and may be compelled by a court of equity, to execute the trust. Wherever a person, by will, gives property, and points out the object, the property, and the way in which it shall go, a trust is created, unless he shows clearly that his devise as expressed, is to be controlled by the trustee, and that he shall have an option to defeat it. *Inglio v. Trustees of the Sailors' Snug Harbor*, 3 Peters, 112; 2 Vesey, Jr. 335. And the court might, upon well established principles of equity, have added, that when such a trust is created, a court of equity will support and enforce it, even if the donor had appointed no trustee, and had let the prop-

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erty go to his heirs; for it is well settled, that where there is a beneficial trust, a court of equity will act as trustee, or appoint one, if necessary, for effectuating the objects of the grantor. *Moore's Heirs v. Moore's Devisees*, 4 Dana, 38. In the same lucid and able opinion, ROBERTSON, C. J., says: "Whenever the only objection to a devise or legacy is, that it is for the benefit of a class of private individuals, described collectively by some characteristic trait, by which they may be identified, if the donation be a charity within the statute of 43 Eliz., and is therefore valid, it is as a matter of course, as good and available as it would have been at common law, had it been to a competent person, in trust for another similar person identified in the will by his proper name; and consequently, whoever may hold the legal title, if it did not pass by the will, will hold it in trust for the collective body, to whose use it was dedicated by the testator. 4 Dana, 368.

The case of *Stone v. Griffin*, 3 Vermont, 400, was an action of ejectment for lands, and in its chief features bears a strong resemblance to the present case. The testator devised to the Methodist Episcopal Church, in Charlotte: "A fourth part of his real estate, the interest of which is to be appropriated for the support and payment of the constant preaching of the gospel in Charlotte, by the ministers of the Methodist Episcopal Church or Society, the principal or original stock to be kept whole, and unexpended, and the interest thereof only, annually appropriated and expended as aforesaid." He further provided for the expenditure of the surplus, if any, in erecting a meeting-house, and purchasing books for the society; and in case of the extinction of the said Church or Society, the interest was to be placed at the disposal of the Annual Conference within whose bounds the said town of Charlotte might be comprised. He appointed seven persons agents and trustees, who were to receive, possess, improve, and take charge of said real estate, for the use and benefit of said Church in Charlotte, subject to the rules and discipline of the Methodist Church. The one-fourth of the real estate was set off according to the will, by the Court of Probate, to the trustees for the church, and they took

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possession. This action of ejectment was brought by the executor, for the heirs of the testator, claiming that the devise to the church was void. The court held, 1. That the church in Charlotte, having no legal perpetuity, could not take the fee; 2. That nothing but the use was given to it by the will; 3. That if the church should become extinct at Charlotte, and there should cease to be an Annual Conference of the Methodist Episcopal Church, there would then be no *cestui que trust*, and the estate would revert to the heirs at law; 4. That it was the intention of the testator that the trustees named, and their successors, should take an estate in fee; yet, as neither the church nor the trustees, possessed sufficient perpetuity to support a fee, the estate descended to the heirs at law, charged with the trust, and they must hold it for the church. On their failure or refusal, the *cestui que trust* shall not lose the use, for want of a trustee. The court, on application, will appoint others to execute the trust.

We therefore think, that in no event, except upon the entire failure of the *cestui que trust*, would the complainants in this case, the heirs at law of the testator, be entitled to claim the estate devised by him for the charitable purposes mentioned in his will; and especially can they not come into a court of chancery, to have the devise declared void, and their claim to the estate made good. It belongs peculiarly to a court of equity to enforce a trust, recognized by the law of the land. And where the trust is for a definite object, and is sustained in point of law, there is no reason why the court, instead of declaring it void, and setting it aside, should not carry it into effect according to the benevolent intentions of the testator. The answer of the defendants, in order to show the nature of the charitable use intended to be established by the testator, and its consistency with the laws and public policy, as well as the capacity of the church to take the estate devised to it, sets forth fully and at length, the constitution and organization of the Methodist Episcopal Church, its nature, objects, and purposes. We are satisfied, from the exposition given, that it should receive the protection of the court, in securing it in the en-

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joyment of the estate bequeathed to it. We think we run no hazard in deciding, that the property may be safely committed to the care of the church and its officers. The objection raised by the demurrer is, that the devise was to the church, and that as the church was not an incorporated body, it could not take the estate; and that consequently the devise is void. We have endeavored to show, that this objection is answered by the fact, that the legal title of the property was vested in the trustees named in the will, and not in the church as a body or society. Such being our opinion, it is not necessary to inquire, whether it is to be considered as a gift of real or personal estate. That question may be determined by the church or those entitled to the beneficial interest. If land is devised, to be turned into money, it is presumed in equity to assume the very character of money. The party entitled may, however, prevent any conversion of the property from its present state, and hold it as it is. Story Eq. § 793. Nor do we see, that it is material for us to determine, whether the defendants take the estate in their corporate capacity, acquired since the death of the testator, or as trustees named in his will, and appointed to that office by the authorities of the church. The record shows, that it is the same persons who are to receive it, in whatever capacity they act. As they are shown to be all members of the Methodist Church, and of the particular class or society to which the decedent belonged, and for whose use the house of worship was designed to be erected, we see nothing to negative the propriety of defendants' transferring the title and possession of the property they hold as trustees under the will, to the incorporation they represent, by appointment of the authorities of the church. *Dutch Church v. Mott*, 7 Paige, 81. The important point is, that the will of the testator be carried out, according to his intention, and that the charitable trusts established by it have their full and proper effect. To this purpose it will be necessary that the trustees invest an amount of the proceeds of the estate in their hands, sufficient to enable them to pay annually to the authorities of the church, the sum of five dollars for the

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support of missions under its care; and a like sum for the minister or ministers whose place of labor shall embrace the class or society worshipping at the meeting-house erected on the land conveyed to said trustees. The remainder of the estate, or so much thereof as may be requisite, is to be applied by them in erecting and finishing the said house of worship, or in repairing the same, if already built and finished. If there is any residue remaining after providing for these objects, it is to be invested, and its annual proceeds added to the amount before directed to be applied towards the payment of the minister or ministers on the circuit.

The judgment of the District Court on the demurrer, is affirmed.

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No matter can be pleaded as *res adjudicata*, which was not covered by, or embraced in, the pleadings of the former suit.

Matters which arise only incidentally, however much they may influence the mind of the judge or jury in arriving at a conclusion, are not matters adjudicated.

In order to make the judgment in the former action a bar to the latter, it must appear that the subject matter of the two actions are the same.

Where in a proceeding to enjoin the city of Keokuk from prosecuting an action against one L., for refusing to pay wharfage for landing at said city, as required by an ordinance of said city, the complainant claimed to be owner of lot six, in block six, in said city, and of the wharf where such landing was effected, and alleged that in December, 1851, he had a wharf boat lying in front of and against said wharf; that the city, under an ordinance prohibiting any person from keeping a wharf boat at any of the wharves, without a license, commenced suit against petitioner for keeping such boat, he having obtained no license; that said suit was appealed from the mayor's judgment to the District Court, where the question was presented as to the rights of the parties; that at the January term, 1852, said court found the facts to be, that the ground in front of said lot belonged to the complainant and those under whom he claims, to the middle of the main channel of the Mississippi river, and that the city had no right to the same as a wharf; and that said court rendered judgment against the town, in which suit the facts on which defendant relied as a defence, were not pleaded, but given in evi-

4	129
102	570
4	199
105	108
4	199
108	8
4	199
112	717
4	199
114	498
4	199
121	594
6121	741
121	743
4	199
128	53

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dence under the plea of *not guilty*; *Held*, That the judgment in that case was not conclusive upon the rights of the parties.

Where the plat of a town, situate on the Mississippi river, duly acknowledged and recorded, declared that "all the streets and alleys shall be and remain public highways forever, *except Water street*," and certain alleys named, which plat was signed by G., "for himself and others," and where in a subsequent suit for partition between the owners of the town, the commissioners, in their report, adopted in the main the plan of the town as laid out by said plat, in respect to the blocks, lots, and streets, and did not except any of the streets from the effect of the dedication as public highways; and in speaking of share eighty of the town, in which is the lot of complainant, the report says: "All the town lots included in the above share, are bounded by the middle of the streets and alleys on which they are situate," and of those next the river, says: "and those upon Water street, include also the land in front of them to the Mississippi river;" which report was adopted by the court, and a decree rendered in accordance therewith:

Held, 1. That the original plat, so far as it was adopted by the report of the commissioners and the decree, became of force; 2. That the report and decree placed Water street upon the same ground, as to publicity, with the other streets; 3. That all the streets were dedicated as highways, and are public; 4. That the exception of Water street on the plat, from the dedication, was void for repugnancy; 5. That the lot owners owned the soil to the middle of the streets and alleys, subject to the public right to the use, control and management of the highway; 6. That the owners of lots fronting on the Mississippi river, own the fee of the land to the river, subject to the public easement; 7. That Water street extended to the river bank, and was not limited in width to the dotted lines marked on the said plat.

A reservation or exception repugnant to the grant, is void.

The proprietor of land upon the bank of, and adjacent to, the Mississippi river, does not own to the middle of the main channel of the river, nor to low-water mark, but to high-water mark only.

Such proprietor owns to the edge of the bank of the river, and the whole bed of the river belongs to the public.

The grant to the Sac and Fox tribe of Indians by the United States, of certain lands, by the act of Congress, of June 30, 1834, was to said Indians as individuals, and is to be construed like any other grant or sale to individuals.

A piece of land dedicated to the use of the public, as a *street*, may be used for the purposes of a *wharf*, for the landing of passengers and the depositing of freight, without any infringement of the right of the owner in fee of the land.

Appeal from the Lee District Court.

THIS is a petition for an injunction. The injunction was allowed by a judge of the Supreme Court, and was returned

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to the District Court, when, on hearing on bill, answer, and testimony, the bill was dismissed, and the injunction dissolved.

The facts, as set forth in the petition, are as follows: that Haight is the owner of lot six, in block six, in the city of Keokuk; that in 1850, he erected a warehouse "on said lot, and in front thereof," that he, and those under whom he claimed, have had possession of the lot since prior to 1841; that in 1842, the owner of the lot commenced building a wharf in front of the lot, out into the Mississippi river, prior to which there was barely room for a wagon to pass in front of the lot, between that and the river, at an ordinary stage, but the wharf has been extended so that now there is a distance of some sixty yards from the lot to the water; that he is the owner of all the ground in front of the lot, to the middle of the river, and has never parted with the title or use thereof, as a wharf; that one D. W. Kilbourn is the owner of lot four, and one Andrew Brown the owner of lot five, in the same block, which are adjacent lots; that said wharf has been extended in front of those two lots also, which part of the wharf he holds and occupies by agreement with those owners, of several years' standing; that the wharf and warehouse have been used for the purposes of such structures, and are a great accommodation to the boating and navigation of the river; that the city has passed ordinances requiring those navigating the river by steamboats to pay wharfage upon landing at the wharf of the city, including the above wharf; that the city authorities threaten to prosecute any who shall so land, without paying wharfage; that they have commenced a prosecution against one Laville, captain of the steamboat Shenandoah, for refusing to so pay, upon landing at complainant's wharf, although he had the full permission of the petitioner; that the threats of the city authorities to sue persons thus landing, without paying wharfage, have the effect to deter many boats from landing at his wharf, and thereby to greatly diminish his business of storage, for which he is remediless at law; and that the city has been at no expense in making the wharf,

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nor has it compensated petitioner for his outlay, nor those under whom he claims.

He then sets forth, that in December, 1851, he had a wharf boat lying in front of said lots, and against said wharf; that the city, under an ordinance for regulating the wharf, and prohibiting any person from keeping a wharf boat at any of the wharves, without license, commenced suit against petitioner, he having obtained no license, and claiming that said wharf is his own property, and, therefore, he was not liable to fine; that that suit was appealed from the mayor's judgment to the District Court, and the question was presented to the court, as to the rights of the parties; and that the court, at the January term, 1852, found the facts to be: that the ground in front of said lots belonged to the complainant, and those under whom he claims, to the middle of the main channel of said river, and that the city had no right to the same as a wharf, and rendered judgment against the town.

The petitioner, therefore, prays an injunction against the town, to prohibit the collection of wharfage from boats and vessels landing in front of said lots, and prohibiting the prosecution of suits against persons for landing vessels at said wharf, without paying wharfage, and enjoining the further prosecution of the suit against said Laville, until the final hearing of this cause; and that petitioner may be quieted in his title to the wharf, and the use thereof.

The answer, so far as is necessary to state it, (for much is superseded by an agreement on the facts), states, that Haight, of his own wrong, erected his warehouse; that in 1849, the town commenced building a wharf upon the river, according to a plan adopted; that at that time the warehouse stood projecting into Water street, and was far below the level of the intended wharf, and the town could not proceed without covering the house, and obstructing access thereto; that Haight was a member of the city council at the time of the adoption of said plan, and approved of it, and yet continued to make his private wharf, with intent to embarrass the town, and prevent her from exercising her rights as the pub-

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lic necessities demanded; that petitioner has made the greater part of his expenditure upon his wharf since the town commenced building her wharf; that she has expended more than 25,000 dollars upon the public wharf; that petitioner's wharf is far below the level of the public wharf; and that if petitioner's pretensions are sustained, the city will practically be deprived of the power to collect wharfage to aid in paying for their improvement. The answer denies that petitioner is the owner of the said land to the middle of the main channel of the river, and that he has not parted with the *use* thereof. On the contrary, it alleges, that the whole of the land on which Keokuk is situate, to the middle of the river, is part of the so-called Half-Breed tract, in Lee county; that prior to the partition, under the decree in 1841, one Isaac Galland had laid out the city, as it now is, into blocks, lots, streets, alleys, &c., and caused a map to be made and recorded, which map is referred to and made part of the answers. The answer refers to, and sets forth, the substance of the proceedings in partition, the decree in which is made part of the case in evidence. The respondent alleges that no new division or plat of the town was made, but that Galland's map, with a few exceptions, was adopted; that a map was made and returned by the commissioners, conforming substantially to Galland's, and that the property was distributed among the parties to the decree according to the numbers, lines, and subdivisions of the said map; that by virtue of the proceedings in partition, and the assent given thereto, the whole of the land in front of the lots on Water street to low water, and thence, by construction, to the middle of the main channel, was dedicated to the public use, but that the proprietors retained the right of soil, and the fee simple; that one Antoine Le Claire, in said partition, drew, by lot, the said lots four, five, and six, in block six, and conveyed them, by that designation alone, without any reference to the ground in front thereof, and by the same description the present proprietors, whoever they may be, hold them; and that the mere fee simple, or right of soil, belongs to them, while the *use* is in the public.

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The answer further alleges, that in the proceeding and decree in partition, the land in front of the lots on Water street is placed upon the same footing as the land forming other streets in the town; that in both cases the right of soil is retained in the proprietors, and the use dedicated to the public; that under the municipal authority, the principal streets have been opened, graded, improved, and long used, without interruption or objection; and that in years past, the town has collected wharfage for every part of the wharf, including that claimed by petitioners.

The respondent denies that in the suit of the city against said Haight, the court found that the right to the use of the land in front of said lots, was in complainant, and denies that the subject matter of this suit has been adjudicated, but that in said cause, it appeared that the then city limits extended to low-water mark only, and therefore its jurisdiction extended no farther, while petitioner's boat was moored outside of said low-water line; and upon the whole finding, the court held said Haight not guilty, without stating upon what ground; that in January, 1853, the General Assembly extended the limits of the town, and conferred jurisdiction to the middle of the river, and gave power to establish and regulate a wharf, and to use the whole of Water street for that purpose; that in September, 1853, the council passed an ordinance, declaring the whole of Water street, and of the land between that and the middle of the river, to be a wharf, and subject to that use, and to the regulation pertaining to wharves and wharfage; and that it is true the city has not expended any money in making that part of the wharf, nor paid said Haight his expenditures, for reason that his own wrongful acts interfered with the plans and works of the city, and he claimed to own the same as his private property. The defendant concludes by claiming that there is no equity in the bill, nor ground for injunction, because, first, the remedy at law is adequate and complete; and, secondly, there is no ground stated upon which a court of equity can interfere.

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An agreement between the counsel makes the following papers and facts evidence: The affidavits are to be taken as depositions: the accompanying decree and proceedings in the suit for the partition of the Half-Breed tract of land; certain maps and plate connected with that suit; the ordinance of the city of Keokuk, in the originals, or in the printed volume; that Brown has title to lot five, and Haight to lot six, in said block six, for the purpose of this suit; that Haight had permission from the other owners; the accompanying copy of the case of *Keokuk v. Haight*; the copy of the case of the same city v. *Laville*; that in the deeds conveying to Haight, the said lot is described as lot six in block six, in the city of Keokuk, Lee county, Iowa, and not otherwise; and that the statement of Guy Wells, and his map, may be used by either party.

Samuel F. Miller, for the appellant.

James M. Love, for the appellee.

WOODWARD, J.—The thought which first demands our attention is, that this matter has been already adjudicated. In this respect the position of things is as follows: In December, 1851, the city of Keokuk sued Haight for the penalty for keeping a wharf boat at the wharf of that town, without a license so to do. The defendant pleaded not guilty of a violation of the ordinance. He was charged with keeping the boat at the wharf or levee built by him, out from the natural shore, in front of lots four, five and six, in block six, mentioned in the statement. The facts which give rise to the question, were not pleaded, but were given in evidence under the above plea. The cause was submitted to the court on fact as well as law. Under the statute, the court reduced to writing its finding of facts, and the law which it applied. It finds many facts, and among them, that the land was, prior to, (a time not named,) private property; that in the year, (left blank, but which in fact was 1840,) Isaac Galland, professing to act for himself and other parties, &c., laid out the town of Keokuk; that there is noth-

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ing to show that at the time Galland laid out the town, "he had any title or right to the same," or any authority to act for the owners, farther than is shown upon the face of the map, (which is his certificate and acknowledgment, signed "for himself and others, proprietors;") that the plat was not made, acknowledged and recorded so as to vest the streets, alleys and public grounds in the town; that by the notes upon the map, it is declared that the streets and alleys shall be public highways, with some exceptions; and that among such exceptions is Water street, which the court finds was not made a public highway by the act of Galland, nor the operation of law; that in the proceedings for partition (which the court finds), between the owners and proprietors, the town as laid out by Galland, was recognized, adopted and made a part of the decree; that in said decree the town lots were bounded by the middle of the streets and alleys, and those upon Water street included all the land in front of them to the Mississippi river; that lots four, five and six, in block six, lie upon Water street, and included all the land in front of them to the river; that the owners own the right of soil to the middle of the river; that Haight owned lot six, and had permission from the owners of four and five, and kept a wharf boat on the river in front of those lots; and that the city by its charter, has authority to establish wharves upon city property only, and fix rates, &c., when so established, &c. Other facts are found, but they are not deemed material. Wherefore the court found that he was not liable to the penalty for not taking out a license to keep his wharf boat, in accordance with the ordinance, and therefore rendered judgment for the defendant.

The question now is, whether the judgment in the above cause is a bar to the present one, which is a bill for an injunction to restrain the city from suing persons for landing boats at the wharf, without paying wharfage. The former suit involved, at most, only the question, whether Haight had a right to keep a wharf boat, as he was doing. Now, however similar the evidence may be in its detail, or the facts developed by the testimony, the questions are totally

unlike. The objects and ends of the two suits—the relief sought—are quite diverse. Allowing the complainant the utmost benefit of the former suit, he could say no more than that it was decided, that he had a right to keep a wharf boat at that place; and this has no apparent nor necessary bearing on the question of the power of the city to demand wharfage. Neither the judgment, then, nor the pleadings, show anything to our present purpose; but to find anything, we have to look beyond them, to the finding of the court. This is in the nature of a special verdict. Such a verdict would find facts only. The rest is the law held by the court. The court held that defendant had the right of soil, and then inferred or held, that in law he had the right to keep the boat, and therefore rendered judgment for him. Now, all this, except the judgment, is incidental. It comes up in the evidence. There is nothing put in issue concerning the title; and to make it conclusive, the matter should, in some manner, have been put in issue. The right of soil, or property, was not the matter in issue, although it was made incidental to it by the evidence. An estoppel, in these cases, arises from the point or matter of fact having been once distinctly put in issue, and having been on such issue joined, solemnly found against the party. 2 Phil. Ev. (ed. 1849–50) 18; 4 Cow. & Hills (ed. of 1849–50) 12 *et seq.*, and note 12, *et seq.*

In order to make the matter a bar, it must have been embraced in some of the pleadings, or in the issue in the former action. 2 Phil. Ev. *ut sup.* 18 to 19; 2 Pick. 20. Thus, any demand or claim embraced in the declaration, or any right or title set up in defence, in a plea, may become a bar; and parol evidence is sometimes admitted to show what was tried or submitted. But this is only to show that some particular item, demand, claim, or right, which would be covered by the declaration or plea of notice, was submitted or was not, as under a general count for money demands, or under a general submission to award, to show that certain demands or subjects were heard and submitted. But it is apprehended, that no matter can be pleaded as *res adjudicata*,

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which was not covered by, or embraced in the pleadings of the former suit. Matters which arise only incidentally in the evidence, however much they may influence the mind of the judge or jury in arriving at a conclusion, are not matters adjudicated. 2 Phil. Ev. 12 to 23, chap. 1, § 1, div. 8. The case of *Standish v. Parker*, 2 Pick. 20, is a case in point, in which PARKER, C. J., says: "The principle adopted is, that in actions of trespass, or for torts generally, nothing is conclusively settled, but the point or points put directly in issue." The matter there sought to be set up as *res adjudicata*, was a right of way, and its position or relation in the suit was remarkably similar to that of the right here set up as a bar. But there is a great difference between the two cases, in one important respect, viz: that the matter or right was the same in the two suits, whilst in the case at bar they are different.

This leads to another rule. The matter of the two actions must be the same, in order to make the one conclusive in the other. 2 Phil. Ev. 5. And it is difficult to see how the matters of these two suits can be considered the same. They may be determinable by the same facts—the same rights or title—but those facts, or that right or title, were not pleaded in the former suit, nor embraced in its pleadings, but arose only incidentally in evidence. The question is a delicate one, and requires discrimination, but we think it clear, upon the whole, that the judgment in the former suit is not conclusive upon the present.

Under this state of things, the case is open to an inquiry into the claim of complainant. He insists, in his bill, that he is the owner of all the ground in front of said lot, to the middle of the main channel of the river, and never has parted with the title, nor the use of the same, for the purposes of a wharf, to the public, nor to the city of Keokuk, nor to any other person. The prayer of the petition is based upon this supposed right to the use of the land between the lots and the river, the same argument being applied to lots four and five, and the land in front of them.

The plat of the town, made by Galland, and the proceed-

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ings in partition are in evidence. By the treaty of August 4th, 1824, (7 U. S. Stat. at Large, 229,) the Sac and Fox tribes of Indians ceded to the United States, certain lands, including those known as the Half-Breed tract, with the following stipulation as to that tract: "It being understood that the small tract of land lying between the river Desmoines and Mississippi, and the section of the above line between those rivers, is intended for the use of the half-breeds belonging to the Sac and Fox nations," &c. By the act of Congress of June 30, 1834, (4 U. S. Stat. at Large, 740,) the United States relinquished and vested in the said half-breeds or those relations who, at the passage of the act, were entitled to the same, all the right, title and interest which might accrue or revert to the United States in those lands, with power of sole devise and descent. Many persons of the half-breed race conveyed away their interest. In 1840, Isaac Galland laid out the town of Keokuk, his certificate being signed by his name, "for himself and others, proprietors." In 1841, there was a decree of partition between those found to own shares, being one hundred and one in number. Galland's map declares that all the streets and alleys shall be, and remain public highways for ever, except Water street, and certain alleys. The commissioners adopt, in the main, the plan of the town, as laid out by Galland, in respect to its blocks, lots, and streets. In their report, they do not except any of the streets or alleys from the effect of the dedication as public ways. Galland's map made three squares public, two (at least) of which the report assigns to individuals; but yet recognizing them all as "squares," in these words: "Arch, Fayette and Chatham squares are each three hundred feet square, or the size of an entire block." The report uses the following language in respect to the town lots generally: "All the town lots included in the above share, are bounded by the middle of the streets and alleys on which they are situated," and of those next the river, it says: "And those upon Water street, include also the land in front of them to the Mississippi river." The above is the language used in relation to share M 80,

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which was Haight's, and by which he obtained lot six in block six; and similar language is used in respect to the shares by which lots four and five were obtained.

The complainant claims some effect from the circumstance that Galland's map does not make Water street a public street. There is no evidence of Galland's authority to lay out a town and record its plat, other than his certificate and acknowledgment upon the map, and the fact, subsequently appearing, that he had an interest in the tract of land. So far as it was adopted in the report and decree, it becomes of force; but where the report and decree depart from it, it is not of force. The latter place Water street upon the same ground, as to publicity, with all the other streets. There is nothing said as to their being public or highways, but they are laid out and named, and called streets, and are in a town. They stand upon the usual ground of streets in a town, whose plat or map is recorded; and in that manner, and so far as that effects it, are dedicated to the public use. In other words, they are dedicated as highways, and are, therefore, public.

But assuming, for the moment, Galland's authority to make the town, it may very well be doubted, whether his exception of Water street from such dedication, was not invalid for repugnancy. A reservation or exception repugnant to the grant, is void. This case is just as if the whole matter were written out in words. The law gives a certain meaning to a plat or map of the town, acknowledged and recorded, without many explanatory words. It is called or named the map or plan of such a town; it is divided into blocks or squares, and lots, and these are numbered; between the squares are spaces, as for ways; and suppose them not named, and not called streets, the proprietor sells lots to various persons. Now, it may well admit of a reasonable doubt, whether he would be permitted to say, that these spaces were not streets and highways; and whether the law does not give to his acts such a signification. But when he calls them streets, and names them as such, it would seem that all doubt is removed. A town, with blocks behind

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each other, to the number of ten or twenty in depth, without streets, would be an anomaly. When he says Water street is a street, but it is not public—it is a highway, but it is not public—this would seem to be incongruous and repugnant. But the report, and the decree adopting it, do not adopt this absurdity. This street stands, as the others do, as regards its publicity.

But what is the effect of the language in the report and decree, that the lots are bounded by the middle of the streets and alleys on which they are situated? It is to give the lot owner the same right in the soil, as the owner of land has in his land over which a highway runs. He owns the soil—the land—the fee simple—but subject, always, to the public right to the use, control, and management of the highway. If the town should be vacated, he would own the land, and with it the use, up to the middle of what had been the street. It is so of Water street in Keokuk. By this decree or partition among the proprietors, those fronting the river, in like manner, own the land—the fee—to the river. But it is subject to the public rights and wants. The lot owner has very little of present interest in it. He does not own the present use. If the town should be vacated, he would then own, and be able to occupy, to the river. But as long as there is a town, it is public, and the use, control, and management of it, is in the public somewhere, and by the charter, this control is placed in the municipal government.

It is taken for granted that no one supposes that, under the language above quoted, a lot proper extends to the middle of the street, for the lots are described, in both Galland's map and the report, as having certain dimensions, say fifty feet in width, and one hundred and forty in depth or length generally; and, again, this construction would leave it a town, without streets! The same reasoning applies to Water street. No other reasoning than the foregoing will answer; for it is impossible to suppose that the proprietors, in laying off a commercial town upon a great navigable river, intended to cut off from free access to that river, all but those who owned the front lots, and thus take away that

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which constitutes the greatest value of them all. What makes the land of this town of more value than a common farm? It is its adaptation to commerce and trade, through its accessibility to a large navigable stream, and thence its communication with the rest of the world.

Again: the petitioner argues that Water street is limited to the width marked on the dotted lines, and that he has right to the space outside of that. Not so; this street is thus described in the report: "Water street extends the whole front or river side of the town, or from the intersection of Orleans street, (on the upper side), with the Mississippi river, down the right bank of said river, with the meanders thereof, to the intersection of Cedar street, (on the town side,) with the Mississippi river." The lines were probably intended for convenience, as indications of distances then existing, but at any rate, must, according to the well-established rule, yield to great natural objects designated as marks and bounds. But, as a consideration of more weight, the report and decree do not adopt these lines and distances, although the map attached thereto shows them. The description of this street, in the report, is as given above, and in fair interpretation, leaves it as undefined in width, extending to the river, and forming the river front of the town.

d / We must give a little attention to this part of the cause. In the case of *McManus v. Carmichael*, 3 Iowa, 1, after a very full argument and hearing, and a careful examination of the subject, as it ~~has~~ been adjudicated upon heretofore, it was determined that the proprietor of land upon the bank of, and adjacent to, the Mississippi river, does not own to the middle of the main channel of the river, nor to low water; but to high water only—that is, he owns to the edge of the bank—and that the whole bed of the river is in the public. If we divide a river into its parts, it consists of banks, bed, and water, and the bed includes the shores; for, to constitute a part of the bed, it is not necessary that it should be always covered by water, yet in order to obtain intelligible terms for different parts, it is often divided into banks,

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shores, bed, and water, still the shore is a part of the bed, or bottom of the river. It is probable that confusion and misunderstanding of cases has arisen from the use of this term "bed" of a river, in different senses, sometimes in its broad and true sense, and sometimes in a limited one, measuring only that part which is always covered by water.

According to the case of *McManus v. Carmichael*, then, Haight owns the soil to high water only. But here is interposed the argument, that this land is not held under the United States by the usual manner of grants, that is, by patent, after a survey, and described by section, town and range. This is true; but yet it will not affect the extent of the complainant's right. The grant to the half-breeds, was to them as persons, and not as a political body. The political jurisdiction remained in the United States. Had the grant been to them as a political society, it would have been a question of boundary between nations or states, and then the line would have been the *medium filum aquæ*, as it is now between Iowa and Illinois. But such a grant could not be, without creating an *imperiam imperio*. This was not designed, and was not done. The grant was to them as individuals—as tenants in common—and is to be construed as any other grant or sale to individuals. It has since been surveyed and divided into sections in the same manner as the other public lands, although the country was not then surveyed, yet the grant extends no further on the river shore or bank, than if surveyed. It has been held, that the government cannot convey the land between high and low water on the public or navigable rivers; (*Mayor, &c., of Mobile v. Eslava*, 9 Porter, 578; *Same case* on error, 16 Pet. 232;) and that this space and these waters belong to the state. *Mayor &c., v. Eslava*, 9 Porter, 578; 16 Pet. 235, *ut supra*; *Pollard's Lessee v. Filer*, 2 How. 572; *Same v. Hagan*, 3 How. 213. Although no state may exist at the time of such a grant, as in this case, yet grants and sales made under such circumstances, are to be construed as having a view to the future sovereignty which may or will arise, and so as not to impair its rights when arisen. It is our opinion,

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therefore, that the complainant's right of soil is to be limited to the line established in the case of *McManus v. Carmichael*.

One further thought, presented by the petitioner, should be noticed. It is, that if this ground is dedicated to the public, it is as a street only; and that if his rights are subject to the public uses, they are so subject to the use of it only as a street or highway, and not as a wharf, and that it is named and called a street and not a wharf. He claims that the object of a street is for passage, for traveling over, and not to land or deposit goods upon. This is taking a very narrow and close view. The streets of a town are fairly subject to many purposes to which a highway in the country would not be. More regard should be paid to the object and purpose than to the name. The ways of a town would be of comparatively little use if the citizens and traders could not deposit their goods in them temporarily, in their transit to the store-house, and so of other things, and so it is of the wharf. If goods cannot be deposited upon it in preparation for shipping them, or unladen upon it from boats and vessels, why is a town located near the river upon land which, in other respects, is inconvenient, and is expensive to grade, to bring into form and order, and to keep in repair, instead of upon an even prairie, requiring no such trouble and outlay? But this is too plain to require words. Let this be called by what name it may, its object is manifest. It is not intended by this to imply that the name given in such cases has nothing to do with the designation of the purpose of the dedication, but only that it is not to be construed too rigidly, and that the manifest purpose is to be taken into view. Had this been named a wharf or levee, the party would have had the same force of argument in objecting to its use for traveling over it. The name street is sufficiently accurate, and sufficiently opens it to all the public uses manifestly intended.

It should be observed also, in relation to this town, that the whole proceeding is to be regarded as an act of the joint proprietors, laying out a town for their mutual and common

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benefit; and hence it should be difficult to adopt any construction detrimental to the interests of a large portion of the town. Such acts should not be construed with close and technical rigidity, although it is true that we must not depart from the settled rules of law. The intent affords the guiding principle. We cannot entertain any doubt that the use of this street, in its full width, is in the public, and the management of it in the municipal authorities. The claim of the town is not one of property, but (as trustees for the still greater public), one of government and regulation, under authority delegated from the supreme civil power of the state, and which is clearly given in the charter of the city. For cases supporting the foregoing views, and upon the subject of town plats, dedications to public uses, wharfage, &c., see *Bowan's Executors v. Portland*, 8 B. Monroe, 232; *Barclay v. Howell's Lessee*, 6 Pet. 498; *Louisville v. Bank of U. S.*, 3 B. Monroe, 144; *Augusta v. Perkins*, Ib. 437; *Bowlinggreen v. Hobson*, Ib. 478; *Giltner v. Carrollton*, 7 Ib. 680; *Kennedy's Heirs v. Covington*, 8 Dana, 61. That a location on a river is sufficient evidence that the town extends to the water: see 2 J. J. Marsh. 224; and *ut supra*, 3 B. Monroe, 144; 7 B. Monroe, 680.

The petition for re-hearing is overruled.

BUTCH v. LASH.

Where the complainant filed his bill in Chancery, praying for an injunction to enjoin the respondent from proceeding in an action at law to recover the possession of a certain town lot, claiming title to said lot through one L.; and where the bill alleged, that the complainant was in possession of the lot at the time of the commencement of the action at law, and had been long before the purchase of the lot by the respondent; that in 1845, the lot was sold to L. by the county of Keokuk, who paid a portion of the purchase money, and obtained a bond for a deed; that he subsequently paid the entire consideration, and obtained a deed; that said deed was never recorded, and is now lost; and that L. had gone to parts unknown, the allegations of which petition, were sustained by proof; and where, on the final hearing

4	215
116	118
4	215
118	30

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of the cause, the respondent was perpetually enjoined from further prosecuting his action for the possession of the lot;

Held, 1. That the complainant had no such complete defence at law, against the action for the possession of the lot, as that a court of equity could not take cognizance of the complainant's bill.

2. That the evidence was sufficient to sustain the decree.

3. That the possession of the complainant was sufficient to put the respondent upon inquiry, before purchasing.

Appeal from the Keokuk District Court.

LASH brought his action against Butch, to recover a certain town lot in Sigourney, in Keokuk county. By his petition he shows that he claims title under a deed from the county judge of said county, of date March 24th, 1855. After that suit was commenced, Butch filed his bill in Chancery, praying that said proceedings at law might be enjoined, for reasons therein stated. The injunction was granted—the bill answered, and testimony taken—and on a final hearing, Lash was perpetually enjoined from further prosecuting his said action. Lash appeals, and claims—first, that the defendant's remedy was complete at law; and second, that under the proof he was not entitled to the relief claimed. The facts of the case are sufficiently stated in the opinion of the court.

Wm. Loughridge, for the appellant.

Knapp & Caldwell, for the appellee.

WRIGHT, C. J.—To determine the first question, it becomes necessary to refer briefly to the case made by the pleadings and proof. Both parties claim title from Keokuk county. The complainant was in possession at the time of the commencement of the action, and had been for some time prior to respondent's purchase. By the bill, Butch claims, that in 1845 this lot was sold by the county to one Linder, who paid a portion of the purchase money, and obtained a bond for a deed; that Linder subsequently paid the entire consideration, and obtained a deed; that said deed was never recorded, and now is lost; and that Linder has

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gone to parts unknown. He also claims, and shows by his exhibits, that Linder sold to one Moody, he to Schilling, he to McIntosh, who conveyed to complainant, by deed of April 3, 1854. All of these deeds, except the one to Linder, were on record at the time Lash obtained title. Upon the supposition, then, that there was a deed made to Linder, as claimed by complainant, which has been lost, and never recorded, the question is, whether his defence to respondent's action was so complete in law, as that a court of equity could not take cognizance of this bill. And this question must be answered in the negative. In the first place, we remark, that the chancellor takes jurisdiction in such cases, where the party complaining either has no remedy at law, or where his remedy is imperfect and inadequate; and therefore, if under the circumstances disclosed, the complainant could not perfectly and adequately be heard in his defence on the law side of the court, he had a right to resort to equity to prevent the commission of a wrong by the respondent's suit, and to insure the administration of that justice to which he was entitled. The respondent's action was brought to test the legal title to this property, and in the legal forum, he was entitled to succeed, if his title, in this respect, was superior to that of complainant. Owing to the loss, and failure to record the deed to Linder, complainant was unable to show a complete chain by the title papers or record. And, under such circumstances, we think he was fully justified in asking equitable aid to ascertain the existence of such deed. We cannot say that his defence would have been adequate and complete at law.

But a further and conclusive consideration in favor of the bill, is, that complainant asked equitable interposition on the ground of accident, and to remove a cloud upon his title. To relieve against an injury resulting from accident, is a very ancient branch of equitable jurisdiction; and by this term, in the language of Mr. STORY, "is intended, not merely inevitable casualty, or the act of Providence, or what is technically called *vis major*, or inevitable force, but such unforeseen events, misfortunes, losses, acts, or omissions, as are not the

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result of any negligence or misconduct in the party." 1 Eq. Juris. § 78. And again: it is said, that the usual instance of such relief, is where a bond or other security has been lost, burned, or accidentally canceled. 1 Eden on Inj. 16. And see *Preston v. Daniels*, 2 G. Greene, 536, and the authorities there cited. The loss of the deed is expressly shown by the complainant's sworn bill; there is no pretence that it occurred from any negligence or misconduct on his part; the respondent had procured a conveyance from the county, which was a cloud upon complainant's title; and to avoid the effect of this loss, and remove this cloud, he might reasonably and properly ask relief at the hands of the chancellor.

That the decree below was justified from the proof, we entertain no doubt. Appellant's counsel claims, that he was a purchaser without notice of any prior adverse title. This is fully negatived by the testimony, however. When he purchased, the bond given to Linder, as well as the certificate of the county agent, were marked canceled, and on file in the office of the county judge, and he was advised by that officer, when negotiating, that the lot had been contracted to Linder. From entries or memorandum appearing on these papers, and on the records of the commissioners of the county, it further appeared, that Linder had complied with his contract, and that a deed was made to him in July, 1846. From the proper records, it is also shown, that the property had passed by regular conveyances from Linder to complainant. In addition to all these circumstances, complainant was in possession, which was sufficient at least to put Lash upon inquiry before purchasing. This inquiry he appears to have made, and in doing so, is shown to have acquired such knowledge of the title, as to entirely preclude the belief that he was an innocent purchaser, without notice.

Decree affirmed.

Cool v. Stone.

COOL v. STONE.

Where in an action for work and labor performed, the defendant answered, admitting the number of days claimed, but denying that the work done was worth the sum of two dollars per day, and alleged that in March, 1856, the parties disagreeing as to the price, had a settlement, at which it was agreed that the defendant should pay the plaintiff \$1.37 1-2 per day, and that he should pay one-half of the sum so found due, within two weeks from that time, and the other half in May then next following; and where the answer further alleged, that the defendant paid to the plaintiff twenty dollars, within one week, which the plaintiff received, and that in twelve days from the settlement, he tendered to the plaintiff, twenty-six dollars, the balance of the half then due, which balance he pays into court; and where the plaintiff replied, denying the settlement and agreement, and the payment and the tender of the money, and also pleaded that the agreement was without consideration, to which the defendant rejoined, that there was a good and valuable consideration for the agreement; and where the court instructed the jury, that if, before the plaintiff commenced his action for compensation, the parties met and agreed upon the amount due, and fixed the time when payment should be made, such an agreement is to be considered an account stated, and is valid in law; *Held*, 1. That the answer of the defendant was not a plea of accord and satisfaction, but a plea of an account stated as the amount to be paid, and then an agreement as to the time of payment. 2. That the agreement was not conditional in its character.

The principle that an agreement, without consideration, to accept a less sum than is due in discharge of the debt, cannot be pleaded as a bar to an action for the whole debt, does not apply to cases where the sum due is unliquidated.

Appeal from the Jones District Court.

THE plaintiff sued for the price of sixty-six and a half days' work as a carpenter, at two dollars per day.

The defendant, by his answer, admits the work and the number of days, but denies that the work was worth two dollars a day. The work was performed in the autumn of 1855, and the defendant alleges, that in March, 1856, the parties, disagreeing as to the price, had a settlement, at which it was agreed that defendant should pay plaintiff one dollar and thirty-seven and a half cents per day, and that he should

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pay one-half the sum so found due within two weeks from that time, and the other half in May then next, which would be May, 1856. He then alleges, that he, the defendant, paid the plaintiff twenty dollars within one week, which plaintiff received; and that in twelve days from the settlement, he tendered to the plaintiff twenty-six dollars, the balance of the half then due, (with interest perhaps,) and this balance he pays into court. The plaintiff, by replication denies the settlement and agreement alleged by defendant, and denies the payment of twenty dollars and the tender of the twenty-six. He also pleads that there was no consideration for the making of said promise alleged by defendant; and that the debt was due at the time of the pretended settlement. The defendant rejoins that there was a good and valuable consideration for the agreement.

A few other facts appear in the case, but the above are all that are material, and are those which give rise to the questions. The court instructed the jury (the abstract proposition is applied to this case,) that if before the plaintiff commenced his action for compensation, the parties met and agreed upon the amount due, and fixed the time when payment should be made, such an agreement is to be considered as an account stated, and is valid in law.

Judgment having been rendered for the defendant, for costs, the plaintiff appeals.

W. J. Henry, for the appellant.

W. T. Barker, for the appellee.

*WOODWARD, J.—The leading error of the plaintiff, and that which disposes of the greater part of his objections, is that he seems to view the answer as pleading an accord and satisfaction, and he argues against the sufficiency of the facts proved to establish this plea in law. It is not a plea of accord and satisfaction, but only an account stated as to the amount to be paid, and then an agreement as to the time of payment. In connection with this, the plaintiff falls into

another error in arguing that an agreement without consideration to accept a less sum, cannot be pleaded to a claim for a greater sum due. Admitting this as law, it applies only to a case where the greater sum which is to be compounded, is a definite, fixed, certain sum. It does not apply to a case like the present, where the sum was yet unsettled, unliquidated, not agreed. The defendant says that they differed as to the amount, and at the settlement agreed upon it, and this is proved, as we infer from the case. It is apparent in the pleadings and bills of exceptions.

One of the bills of exception states that the plaintiff proved, (that is, offered evidence tending to prove,) that his work was worth one dollar and a half a day, and the plaintiff then assumes this to be such a "sum due," as cannot be compromised for a less sum except under some good and valuable consideration, and that the less sum must be paid, in order to constitute a bar to the original claim. In this the plaintiff is in error. His assumption is not correct. The facts show a settlement of an agreement upon a disputed matter, and nothing more. Another ground which plaintiff takes, is this: he claims that the defendant did not pay the first half of the money found due him, at the time agreed, and thence argues that the whole agreement is broken, and that he can set it aside and stand upon his original claim. There is nothing in the transaction, as shown, and there is not a word in the proof as given, to show that the settlement was thus conditional. It is not so in its nature, and we cannot give it this construction. As these considerations go to the foundation of the instructions, to the refusal or giving of which the plaintiff excepts, it is deemed unnecessary to enter into them in detail. Three special issues were submitted to the jury, who were instructed to find specially on each. They were, (stated briefly): 1st. Did the parties have a settlement of the matters in dispute before suit? To which the jury returned that they did. 2d. Did the plaintiff agree to pay one dollar and thirty-seven and a half cents per day, one-half in two weeks and the balance in May? Verdict, that he did. 3d. Did the plaintiff pay or tender the

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one-half within the two weeks, if not, did he before suit? Verdict, he did not pay nor tender within the two weeks, but did tender before suit. The defendant, then, did not pay when the money was due, but saved himself by his tender before suit.

Whether the court should, strictly speaking, have rendered judgment for the plaintiff, is regarded as an immaterial question, since if judgment were so rendered, it must be at the cost of the plaintiff. The money was paid into court, and the plaintiff was at liberty to take it. If the money had not been thus paid in, the plaintiff would have been entitled to judgment (at his cost) so that he might have execution. On the whole, we think there is no error in the record, and the judgment of the District Court is affirmed.

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92	681

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A voluntary agreement, without any valuable consideration, cannot be enforced against the heirs of the party making the agreement.

If a contract, by which a trust is created, is complete and executed, it will not be disturbed for want of a consideration; but courts of equity will not carry into effect a mere voluntary agreement, contract, or covenant, to transfer property.

The want of a consideration, is universally a good defence to a bill for rectifying a voluntary conveyance, or enforcing a voluntary agreement.

The meritorious consideration of providing for a child, has always been held sufficient to authorize the enforcement of an executory contract against the party contracting; but where the contest is between one child and other children of the same ancestor, the meritorious consideration operates on both sides, and being equally balanced, equity will not interfere, or lend its aid.

A party claiming a conveyance of real estate, who does not allege, and cannot prove, that the land was purchased with his money, cannot be permitted to show, by parol evidence, that the purchase was made for his benefit, or on his account.

The title to a land warrant will not pass by delivery, without assignment.

No evidence of any contract for the creation or transfer of any interest in real estate, is competent, unless it be in writing, and signed by the party sought to be charged, or his agent.

Appeal from the Polk District Court.

THE complainants ask, that the defendants be decreed to convey to them all their right, title, and interest, in certain lands in Polk county, Iowa, and aver, that Isaac Ash, the father of the complainant Eveline, and of the defendants, purchased two land warrants for the said Eveline, at the price of \$220, which were intended by him, and were received by her, as an advancement; that the parties were at the time, to wit: the spring of 1849, living in the state of Indiana, and in consequence of receiving said land warrants, they removed to the state of Iowa, where, in the same year, they located the land, according to agreement, in the name of said Isaac Ash. They aver, that they were at an expense of \$100 in locating the land warrants; that the said Isaac Ash died without having conveyed the land purchased with said warrants to said Eveline; that his widow, since his death, has conveyed her interest to complainants; and that the defendants, the heirs of said Ash, refuse to convey. The complainants ask a decree against them, and for general relief.

The defendants answer, and deny the purchase of the land warrants for the said Eveline, or that they were intended as an advancement to her. They deny that the complainants were induced to remove to Iowa by receiving the land warrants, and that they were located by them at the expense of \$100, as charged. They aver, that complainants had previously bought land in Iowa, and had intended to remove to the state; that they had received already large advancements from the said Isaac Ash, the father, and that complainant Granville Holland was largely indebted to his estate, for money paid as surety for said Holland. The defendants also claim that the property in the land warrants could not pass by delivery, but must have been assigned in writing, and rest, as a defence, upon the statute of frauds.

The testimony in the case shows, that in 1848, complainants were living in Indiana; that Granville Holland had

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failed in business, and that Isaac Ash, his father-in-law, aware that he was engaged in no business, was anxious that he should remove to Iowa, and as an inducement for him to do so, promised to assist him pecuniarily; that Holland paid a visit to Iowa, liked the country, and determined to remove to the state; that Ash purchased two government land warrants, for one hundred and sixty acres of land each, with a view of having them located in Iowa, the land to be for the benefit of Mrs. Holland and her children. He stated to different persons, and at different times, that he had purchased the land warrants and given them to his daughter Eveline; that the land was to be located in his own name; on account of the embarrassment of Granville Holland, her husband; that it was intended as an advancement to Mrs. Holland, from his estate, for her benefit, and that of her children, in order that they might have a home. After the warrants had been located on the land in controversy, he said to others, that he never expected to live on it; that it was designed for Mrs. Holland and her children, and he intended giving it to them; that he designed giving to each of his other children a like amount, in like manner, except that the title to the land in the case of Mrs. Holland, he would keep in his own name, so that it might be secured to her and her children, from the creditors of her husband. The complainants removed to Iowa in 1849, and brought with them the land warrants received by them from Isaac Ash, which were located by Holland, on the lands now in controversy, in Ash's name. It is not shown that the complainants ever resided on the land, or that there was any improvement on it. Holland claimed to have it in possession from 1849, but not by any visible or actual occupancy. The expense of a journey from Indiana to Iowa, in order to locate the land warrants, it is shown, would have been about sixty dollars.

By the defendants, it is shown, that Ash, at his death, in 1851, left five heirs; that before his death, Holland and wife had received an advancement from his estate, to the amount of eight hundred dollars; that when complainants

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left Indiana, Ash had to pay for him about nine hundred dollars, borrowed money, for which he was surety; that Holland had never paid taxes on the land; and that to persons visiting the country from Indiana, he had pointed it out as the land he had located for Isaac Ash, with the land warrants. It further appears, that in 1852, after the death of Isaac Ash, the complainants conveyed to a trustee, for the benefit of Holland's creditors, all their interest in certain property which was of the estate of Isaac Ash, deceased, at the time of his death. Whether it embraced their interest in the whole estate does not appear, but it included the personal estate and the land in controversy.

The District Court, at the hearing, found the facts alleged in the complainants' petition to be true, and that they were entitled to a conveyance from the heirs of Ash. A decree to that effect was rendered accordingly, from which decree defendants appeal.

Barlow Granger, for the appellants.

Curtis Bates, for the appellees.

STOCKTON, J.—The complainants claim: 1. That the land warrants were intended by Isaac Ash as an advancement to his daughter, the complainant Eveline, and that the property in them passed to her by delivery, without assignment. 2. That the purchase of the lands with the warrants, in the name of Ash, raised a resulting trust in favor of complainants, which the other heirs of Ash are, in equity, bound to carry out, by the conveyance of the land to complainants. We think that these conclusions are not warranted, either by the facts or the law.

In the first place, there is no sufficient evidence that Isaac Ash intended to vest in his daughter, Mrs. Holland, the property in the land warrants. We recur to portions of the testimony: One of the witnesses, Talbot, testifies that Ash said, that "the land warrants were for the use and benefit of Eveline and Granville Holland, and were intended as a

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gift." Preston, another witness, says, that Ash told him "he designed the lands in Iowa, entered by Holland, for the benefit of Holland and his family; that they were a gift, and that he had given Holland the warrants, who located them in Ash's name." Another witness, Eckels, says that Ash told him "he had caused some land warrants to be located in his own name, which he intended as an advancement for the benefit of his daughter, Eveline Holland; that he intended to give to each of his other children in like manner, or equal amount, except as to the title in the case of Mrs. Holland, which he intended to keep in his own name, so as to secure it to her and her children." To the same purport is the other testimony. It would be difficult to misapprehend the object of Ash, the father. His intention was freely announced to many of his friends. He did not design to give the property in the land warrants to complainants. He did not wish that the land, which was to be procured with them, should be in their name. He intended that everything should be in his own name, for the use and benefit of his daughter and her family. He wished to secure it to them; and there was neither word nor deed from which we are authorized to infer, that he transferred the property in the land warrants to complainants, or intended to give them the control thereof. The words "gift and advancement," used by him, are quite consistent with his declared intention to keep the title in himself, and to confer upon them only the use. Nor does it appear to us satisfactorily, that the title in the land warrants passed by delivery. The laws provide for their transfer by assignment. But complainants have not offered to show that they were assigned, in blank or otherwise, so as to vest the title in themselves. What is conclusive in our view of the matter, is, that the evidence shows that Ash intended, all the time, that the title of the land purchased with the land warrants, should be in his own name. The second proposition of complainants fails, of course, from their failure to establish the first. Unless the property in the land warrants vested in them, there was no resulting trust. They must have paid to the United States the con-

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consideration for the land, before there is any trust of the legal estate in Ash or his heirs, for their use or benefit. Story's Eq. Jurisprudence, § 1201. We have carefully looked through the pleadings and the testimony, to ascertain if there is anything therein upon which the decree of the District Court can be sustained. We have found nothing. The intention of Isaac Ash, as declared by him, at the time of the removal of complainants to Iowa, in very plain and unmistakable terms, is clearly shown. It is the misfortune of complainants, that such intention was only declared by words, and seems at no time to have been evidenced by any writing. As he made no will, and placed on record no declaration of the trust, we are left to presume that, before his death he changed his intention, and suffered the land purchased with the warrants to descend to his heirs with the residue of his estate. We are fortified in this conclusion by the fact that the complainants, after their removal to the state, did not settle upon or improve the land, but had made their home elsewhere.

The other reasons urged by defendants, against the relief sought by complainants, are, in our opinion, equally cogent and conclusive, and will be only briefly noticed :

1. The agreement of Isaac Ash was by parol only, and no evidence of any contract for the creation or transfer of any interest in lands, is competent, unless it be in writing, signed by the party or his agent. Code, § 2410.

2. It was a voluntary agreement, without any valuable consideration, and as such, cannot be enforced by complainants against the heirs of Isaac Ash.

We think, that on either of these grounds, the defendants are entitled to have the decree of the District Court reversed. The consideration money for the land, was paid by Isaac Ash. He bought and paid for the land warrants, and purchased the land with them, taking the title in his own name. To suffer the complainants to show by parol, that the land was a gift to them or that it was purchased by Ash, with his money, for their use, would be to overturn the statute of frauds. *Botsford v. Burr*, 2 John. Ch. 407; *Blair v. Bass*,

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4 Blackford, 545. If complainants had purchased the land with their own money, or land warrants, and had taken the title in the name of Ash, a trust would have resulted to them, because of the payment of the purchase money; and defendants would have been required to convey to them. *Boyd v. McLean*, 1 John. Ch. 582. As they did not pay the purchase money, they cannot be permitted to show by parol proof, that the purchase was made for their benefit, or on their account. *Bottsford v. Burr*, *supra*; Code, §§ 2409, 2410.

The second objection is equally forcible. The declaration of Isaac Ash, that he held the title of the land for the use and benefit of complainants, was a mere voluntary agreement, without any valuable consideration, and incapable of being enforced against the defendants. If the contract by which the trust is created, is complete and executed, it will not be disturbed for want of consideration. But courts of equity will not carry into effect a mere voluntary agreement, contract, or covenant to transfer property. *Minturn v. Seymour*, 4 John. Ch. 498; *McIntire v. Hughes*, 4 Bibb, 186. The want of a consideration, is universally a good defence to a bill for rectifying a voluntary conveyance, or enforcing a voluntary agreement. *Dawson v. Dawson*, 1 Devereux Eq. 93, 99; *Banks v. May's Heirs*, 3 Marshall, 435; *Bibb v. Smith*, 1 Dana, 580. The meritorious consideration of providing for a child, has always been held sufficient to authorize the enforcement of an executory contract against the party contracting. But where the contest is between one child and other children of the same ancestor, the meritorious consideration operates on both sides, and being equally balanced, equity will not interfere or lend its aid. *Leading Cases in Equity*, 217, citing *Ellis v. Nimmo*, Loyd & Goold, 333; *Jeffreys v. Jeffreys*, 1 Craig & Phillips, 138.

We deem it unnecessary to dwell at length, upon other facts which are entitled to their due and proper weight in the decision of this case. Without mentioning others, we only advert to the fact, that the complainants have united in conveying to a trustee for the benefit of the creditors of

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Granville Holland, all their interest in certain town lots in Greencastle, Indiana, and in the land in controversy, as part of the estate of Isaac Ash, deceased. This suit is therefore carried on for the benefit of these creditors. If the land is decreed to complainants, it will go, not to fulfill the purpose for which the evidence shows it was at one time designed by Isaac Ash, viz: to furnish a home for his daughter and her children, that would be assured to them beyond the reach of chance or casualty; but, as if to thwart that very purpose, it will go to satisfy the ever craving and remorseless creditor. And while we would not wish to be understood, as hesitating to award complete justice to complainants, for the reason that they have been willing to suffer the patrimonial estate of Eveline Holland, to be swallowed up by the claims of the creditors of the husband, yet when it is shown, that the effort now made to establish a resulting trust upon the parol declarations of the ancestor, is to be the means of enabling these creditors to defeat the repeatedly expressed intentions of Isaac Ash, as to the disposition of property intended by him for the sole use of his daughter and her children, the discretionary power of this court, will not be exercised to aid in the accomplishment of any such end.

Nor does it seem to us, that complainants, at the time of the execution of the deed of trust to Cowgill, claimed the exclusive ownership of these lands. The conveyance to the trustee, as we understand the testimony, was of their right in and to the lands, as part of the estate of Isaac Ash. Such recognition by them of the lands as part of his estate, is inconsistent with the claim of exclusive ownership, now set up by them. Indeed, this claim of exclusive ownership, by virtue of a resulting trust, seems to us clearly to have been an after-thought. The complainant's bill should be dismissed.

Decree reversed.

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Where a question of fact is tried by the court and its decision thereon reduced to writing, under section 1793 of the Code, the appellate court may review the finding of the court on such question, as on a motion for a new trial, on the ground that the verdict is against the evidence, but in order to warrant such review, all the evidence on which the finding of the court below was had, must be before the appellate court.

A partner, who in an action against the partnership, or against the surviving members of a partnership, to recover a debt due by such partnership, permits a judgment to go against him for the debt and costs, becomes a competent witness, to prove that a co-defendant was not a member of such copartnership.

In such a case, the interest of the witness is against the party calling him; and the plaintiff cannot debar the testimony of the witness, by refusing to take the judgment offered.

Where in an action against two persons, as surviving members of a copartnership, the defendants, on the trial, offered to permit the plaintiffs to take judgment for the amount of their claims and costs, against one of said defendants, and thereupon claimed the right to read the deposition of such defendant in evidence, for the purpose of proving that the other defendant was not a member of such copartnership, which judgment the plaintiffs refused to receive, and the deposition was rejected; *Held*, That the plaintiff could not refuse to take the judgment, and that the evidence was admissible.

In an action against a partnership by a creditor, the declarations of the partners, made while the firm was in existence, and before any difficulty arose, are admissible in evidence to show that one of the persons sought to be charged, was not a member of such partnership.

Such declarations to be admissible as evidence, must have been made before difficulty arose, whilst the business was going on, and as imparting information to persons with whom the firm dealt, and the world.

The admissibility of the declarations of a partner, showing who are members of the firm, does not depend upon the fact that such partner has deceased; but are receivable, upon the ground, that as the plaintiff must recover against all the defendants or none, and as such partner, if called to testify in person, would be testifying *in present*, he would be interested to defeat the suit.

The testimony of a witness as to whom he gave credit, as members of a copartnership, when selling goods to the firm, is but the opinion of the witness, and is not receivable in evidence.

The declarations of a party sought to be charged as a partner, are not admissible to prove that he was not a member of such copartnership.

The common effect of an appeal, where a supersedeas bond is filed, is to suspend the effect or operation of the judgment appealed from.

Where a decision of the District Court, dissolving an attachment, is appealed

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from in due time, and a supersedeas bond filed, the decision of the court is suspended; and if reversed, the property seized under the attachment, is still held by the writ.

Where property was seized by attachment, some of which being perishable, was sold by the sheriff, and the proceeds thereof paid over to the clerk of the District Court; and where at the June term, 1854, of the District Court, and on the 2d day of the month, the attachment on motion of defendant, was dissolved without any order respecting the property attached, upon which the sheriff delivered the attached property remaining in his hands, and the clerk paid over the proceeds of the property sold, to the defendant's attorney, "taking an accountable receipt;" and where on the 6th day of June, and during the same term, the plaintiff appealed from the judgment of the court dissolving the attachment, and filed a supersedeas bond, which judgment was reversed by the Supreme Court; and where at the next term of the District Court after such reversal, the plaintiff obtained judgment against the defendant, on his claim, and thereupon moved for a judgment against the property attached, and for a special execution, which motion was overruled; *Held*, That the property attached was still liable, and that the court erred in overruling the motion for a judgment against the property, and for a special execution.

Appeal from the Dubuque District Court.

THIS is an action against John O. Carter and Samuel E. May, as surviving partners of the firm of A. W. Carter & Co., on two promissory notes executed in the name of the copartnership—A. W. Carter having deceased before the commencement of the suit. May was conceded to be a partner. John O. Carter denied that he was a member of the firm. Judgment was rendered for the plaintiffs. Both parties appeal. The facts necessary to an understanding of the cause, and the questions decided, are fully stated in the opinion of the court.

Smith, McKinlay & Poor, for the plaintiffs.

Clark & Bissell, for the defendants.

WOODWARD, J.—The cause was tried by the court, under section 1772 of the Code, and under section 1798, the decision of the court is given in writing, showing the facts found and the law adjudicated. It is upon this, the questions of the case principally arise.

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The counsel, however, appear to regard the appeal as reaching, and bringing up for review, the finding of the court on the matters of fact. This may be admissible, regarding it as in the nature of a review of the verdict of a jury, upon a motion for a new trial. But in such case, all the evidence must be before this court. In the present cause, the deposition, (or other testimony,) of May, is wanting; and as we hold his testimony admissible, we cannot proceed to an adjudication upon this branch of the case. And if this testimony were before us, it would not be suitable for us to review the finding of the court upon the facts, because several questions are made as to the admissibility of testimony, or the competency of witnesses, an adjudication upon which would render it proper to remand the cause, whatever might be our opinion of the former finding. The present case is an illustration of the purpose of causing the decision of the court, as to the facts found, and the law held applicable, to be given in writing. There are other questions in the cause than, that whether J. O. Carter was a partner. These others are questions of law, and are properly brought up.

The first of these questions is, whether May was competent as a witness, being called by the said Carter to prove that the latter was not a partner in the firm of A. W. Carter & Co. The deposition of May appears to have been taken, but is not among the papers, so that we are not able to refer to any special matter of evidence, as given by him, but will simply assume, that he testifies to the fact, that Carter was not a partner, or facts tending to show this. It appears, from a bill of exceptions, that on the trial the defendants proposed to permit the plaintiffs to take judgment upon their claims against the said May, as surviving partner of the firm of A. W. Carter & Co., and thereupon claimed the right to read his deposition in evidence. The plaintiffs refused to take such judgment.

There was no controversy about the amount of plaintiffs' claim, nor about May being a partner. May is a defendant, not only in fact, but is so on the record. He is liable for

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costs, and for the debt, and he would be liable to Carter for contribution, if the latter paid. On the other hand, he is called by Carter, and it will be seen that May, in giving judgment, takes the debt and costs upon himself at once, and absolutely, so that they are not subject to any contingency arising from his testimony, and he is interested to throw a part of the burden upon another—upon Carter. It would seem, therefore, that he has no interest, except that which is against the party calling him. He gives judgment, and that is all the plaintiff can have as to him, in any event. But the plaintiff may say, he has a right to his judgment against both. He has this right, if the facts and truth give it to him; and the only question is, whether this is a proper method of getting at the facts.

But, again; the plaintiff may say, that his action is against the defendants jointly, and that if he fails to obtain judgment against both, he can have it against neither. Is not this objection answered by May giving judgment against himself? He cannot make the objection, and the record would show the proper matter to estop him; and if the plaintiff succeeded, notwithstanding May's testimony, in obtaining verdict and judgment against Carter, then the objection would have no place. The objections arising from interest, therefore, and the technical one relating to the plaintiff's rights, seem to be obviated, and the question becomes simply this, whether he is incompetent merely as being a party to the record. The being thus a party, is usually put as the criterion; for it is rare that one is a party, without being in some manner or degree interested. The case presents an instance out of the range of all common precedent. But if a case can be framed, where a party to the record has absolutely no interest, or where it is all against the party calling him, why should he not be permitted to testify? When May offered to give judgment against himself, he settled all the ordinary questions of interest, save that point in which his interest was against the party calling him, and of this, the latter takes the chance upon his own shoulders.

This subject is discussed fully in the American note to

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Bent v. Baker, 2 Smith's L. Ca. 85. The tendency in the latter times has been, in doubtful cases, to refer the objection to the credit, rather than the competency, of a witness, and not to exclude the light, unless there is a necessity for it. After giving due consideration to the thoughts suggested in the above note, we come to the conclusion, that judgment should have been rendered against May, and that then he would become a competent witness. It appears to this court, that the plaintiffs cannot debar the testimony of May, by refusing to take the judgment offered. The point is very considerably similar to that in *Bent v. Baker*, in relation to which Lord KENYON makes the remark: "Now, the defendant below, and the witness, offered that the bill should be dismissed as to them at their own costs, which, however, was refused; but after such refusal, neither in justice, nor common sense, can we suffer those parties to make the objection." 8 T. R. 27; 2 Smith's L. Ca. 74 [45]. The foregoing remarks are made with a view to the actual position of May, and to the apparent and presumptive interest which he has, or may have, arising from such position, but they are not intended to reach all possible matter of interest which might be shown. If a showing were made of some special interest, outside of the circumstances alluded to, he might still be held incompetent.

There is another class of objections made in this cause. The plaintiffs moved to reject the depositions of Wheelock, Pecker, White, and Cyrus L. Carter, at least that part of each of them, which goes to show who were partners in the firm of A. W. Carter & Co., upon the common ground, that the information they give, is derived from the persons supposed to have been partners, that is, from A. W. Carter, John O. Carter and May. This objection is aimed at those parts of the depositions which tend to show, by the declarations of the partners, that John O. was not a partner. This is one of those questions, the answer to which is variable, dependent upon the position of the cause, and the relation of the parties. If there were a controversy among the partners, the declarations of none of them could be

given on the side of their interest, upon the question who were, or who were not partners. But here is the case of creditors suing a firm for the recovery of their debts. Here the declarations of a party charged cannot be received to prove that he was not a partner, whilst they would be competent to show that he was. On the other hand, the testimony of the other partners is not receivable to make him one of them. John O. Carter's declarations are good to prove him one of the firm, but not to show the contrary, unless, possibly, under some peculiar circumstances. But why should not the declarations of the other partners, made whilst the firm was going on smoothly, before any question or difficulty arose, be receivable to show that one was not a partner? Take, for instance, the representations of A. W. Carter, when in Boston, purchasing goods, and when he is asked who constituted the firm which wishes to purchase goods and obtain a credit. It is true that his representation as to who were interested, would not bind those he named, though it would himself, but would they not be, at least, competent to show who were not interested?

If these declarations are not admissible, the position of a clerk may be a dangerous one. You can prove acts enough upon him every day, to make him a partner, and unless he has a written contract of employment, he is helpless; and is not even that contract itself, a declaration of the partners, or some of them? But even if such declarations of partners are admissible, it does not follow that the partner himself, as A. W. Carter, or May, could personally be a witness; for the foregoing remarks refer to past declarations, made before a question arose, and under indifferent circumstances; and further, as the plaintiffs must recover against all the defendants, or none, and as such partner, witness would be testifying *in presenti*, he would be interested to defeat the suit. This consideration would exclude May's deposition, did he not offer the plaintiffs a judgment, and thus obviate all these objections, by taking the debt, cost and all, upon himself.

Much might be said upon this subject, but time does not permit extended remarks. It is the opinion of the court,

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that the declarations of A. W. Carter, made before difficulty arose, and under indifferent circumstances, are receivable. But these questions depend so much upon the actual relations of the parties, that no general proposition, farther than above stated, can be laid down. The admissibility of this testimony does not depend upon the fact, that Carter is dead, for those of May, also, would be equally receivable, unless upon the ground that the party makes him a witness. There are cases, such as that of an agent, when one may give his declarations, or may make him a witness. Whether May stands in such a position, that this may be done in his case, we do not determine; but it is sufficient to say, that both his declarations and his deposition cannot be received, and that the other defendant, having made him a witness, cannot make use of so much of the other depositions as relate to his declarations.

The testimony of Pecker, upon the matter as to whom he gave credit, as members of the firm, when he sold goods to them, strictly considered, is not receivable. It is giving his opinion only. The leading objection to the deposition of Cyrus L. Carter, and of White, is of the same nature with those above considered. The declarations of Carter are not admissible, to show that he was not a partner, and so far the objection should be sustained; but those of the other members, made under the proper circumstances, as before qualified, may be received. The objections to Pecker's deposition, the one being to the matter to whom he gave credit, so far as this is concerned, the ruling was right. The other was to the declarations of A. W. Carter and of May, the ruling on which we think was erroneous. The same exceptions taken to the depositions of C. L. Carter and of White, were sustained, in which we think there was error, so far as regards the declarations of A. W. Carter. The case of May, is distinguished from that of the said A. W., in that May is made a witness.

It is to be remembered, that so far as interest is to be looked at, this is against the party offering the declarations, and the declarations are against the (present) interest of those

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making them; and principally, that these declarations are to be regarded as constituting a part of the *res gestæ*. They were made, (or to be admissible, must be made,) before difficulty arose, whilst the business was going on, and as informing persons with whom they dealt, and the world, who did and who did not compose the firm. See the note to *Bent v. Baker*, 2 Smith's L. Ca. 115 *et seq.*

Another branch of this case relates to the attachment. The question is as follows: A certain amount of groceries and other property, had been attached. A part of the property being sold as perishable, the sheriff paid the amount thereof, being \$404, to the clerk, under §§ 1881 and 1882 of the Code. At the June term, 1855, in the District Court, the defendants moved, that the attachment be dissolved or quashed. This motion was granted, and the attachment was set aside, without any order respecting the property. This was on the second day of June, and on the sixth, during the same term, the plaintiff appealed from this decision of the court, and filed a supersedeas bond. The judgment of the District Court, quashing the attachment, was reversed. At the following term of that court, judgment in the principal case being rendered in favor of the plaintiffs, they moved for a judgment against the property attached, and for a special execution. This motion was overruled. It appears that on the decision of the court setting aside the attachment, and before the appeal was taken, the sheriff delivered up the attached property remaining in his hands, and the clerk paid over the money which was in his hands, to the defendant's attorney, "taking an accountable receipt therefor." The plaintiffs excepted to the decision of the court, in refusing to render a judgment against the property, and to order a special execution, and appealed from the same.

The question now is, whether the attachment still holds the property, the judgment of the court dissolving it, being reversed. We believe that the only consistent decision is, that it still holds. This court has held in this and other cases, that an appeal lies from a judgment of the court, dismissing an attachment. The common effect of an appeal is

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to suspend the effect or operation of the judgment appealed from, if a supersedeas bond is filed, as required by law. What other object can there be in an appeal, in such a case as the present? And what exempts a judgment on an attachment from the ordinary effect of the appeal? It would seem, upon reason, that an appeal should save this, as well as any other part of a cause.

What has been decided which negatives this idea? We will notice such cases as we have been able to see.

Clapp v. Bell, 4 Mass. 99. Judgment for defendant, and plaintiff prosecutes a writ of review. The case is short and unsatisfactory, but the review seems to be considered as an independent proceeding. The court appear to recognize the thought, that an appeal saves the attachment.

Otis v. Warren, 16 M. 53. A writ of error from the Supreme Court of United States to Supreme Court of Massachusetts, releases an attachment. This is placed upon the ground, that the law requires that security be given, which, says the court, "is a substitute for any which before existed."

Danielson v. Andrews, 1 Pick. 156. An increase of the *ad damnum*, releases the attachment.

Hill v. Hunnewell, 1 Pick. 192. A reference of the cause and of all demands (between the parties) dissolves it. This case is sometimes referred to, to show that a reference of the cause would destroy the lien of attachment. But such is not the case. This effect is only when the reference is of all demands. JACKSON, J., remarks that, in order to save an attachment, it was usual for parties to enter into a reference of the action, and of all demands which the defendant has against the plaintiff. This is the view taken of the case in *Mooney v. Kavanagh*, 4 Greenl. 277, where it is put distinctly upon the ground of the reference of all demands; and the court say, that if it is desired to avoid this effect, the reference must be limited to the action, or to that and all demands of the defendant, against the plaintiff. This doctrine has for its base the idea, that such a reference of all demands, (thus including the plaintiffs,) is equivalent to filing a count for a new demand or cause of action, as in

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Willis v. Crooker, 1 Pick. 204, or to an increase of the *ad damnum*, as in *Danielson v. Andrews*, 1 Pick. 156.

Bayley v. White, 4 Pick. 395, and *Dunklee v. Fales*, 5 N. H. 527, hold possession a requisite to an attachment of personalty.

In *Brown v. Harris*, 2 G. Greene, 505, the attaching plaintiff was nonsuited on the 2d November. On the 7th November, he filed an affidavit to have the nonsuit set aside, which was done. Held, that the attachment was gone. In this case, the cause had been terminated, but was reinstated. By an appeal, it is continued on in its natural course. But though we may assent to the result in *Brown v. Harris*, yet the reasoning of the case is unsatisfactory and inconclusive. It simply asserts the supposed rule of law.

Bowman v. Stark, 6 N. H. 459. Attachment is not dissolved by the death of the defendant.

Hackett v. Pickering, 5 N. H. 19. Attachment of goods not *ipso facto* dissolved, by lapse of thirty days after the term, when the defendant was defaulted, though no continuance was ordered. The court might, in its discretion, order the case brought forward at the next term, in order to save the attachment.

Miller v. Clark, 8 Pick. 413. Filing a new count for the same cause, does not affect the attachment.

Some other cases, sometimes cited on the question, do not aid in its solution. Such are found in 8 Fairf. 241; 8 Pick. 419. We have not been able to see 2 Aik. 299; 7 Conn. 271; 1 Sto. 601.

When the question bears upon the relations of third persons, it is manifest that the attachment may be gone, when it would not be, if viewed with reference to the two parties alone.

From the nature of the case, and from the fact that an appeal causes the judgment appealed from to cease having any effect, (5 M. 376,) it would seem that the attachment must be preserved, if the appeal is taken in due time. And this view is sustained by the case of *Suydam v. Huggeford*, 23 Pick. 465. In this case, the court says: "But a judg-

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ment against the plaintiff, puts an end to all attachments, unless appealed from. In case of an appeal, they (trustees) must necessarily follow the cause, because in legal effect such appeal, if duly prosecuted, is regarded as in the nature of a continuance of the proceedings."

We are satisfied that, on both reason and authority, the appeal holds the attachment. But the question naturally arises, whether the attachment is to hold indefinitely, and wait to see if the party intends to appeal? By no means. There is a natural course of thought which grows out of the state of the case, and governs it. The judgment is final, unless appealed from, and the officer cannot continue to hold the property by his own authority; but the cause must be placed in such a position that the law will hold it. During the term, the records and judgments are under the control of the court, and may be reversed and set aside. If the defendant desires an immediate return of the property, he should, with notice to the other party, move the court for such return. On the other hand, the plaintiff must take his appeal immediately, in the legal sense. He cannot wait the year allowed by the law in ordinary cases; for then, in the meantime, there is nothing to hold the property. It is as when a party is hastened to perfect his appeal, by the issuance of an execution. The law gives him a year, but intervening circumstances compel a more speedy action.

Theoretically, the appeal must be taken forthwith; practically, in a reasonable time. It cannot be an instantaneous thing, and if the redelivery of the property might be made instantaneous upon the decision, then the defendant or the officer, could, in every case, cut off an appeal. The law is intended to be reasonable. The defendant can move the court, as above suggested. Then the plaintiff must appeal during the term. This is reasonable; it makes the appeal a substantive thing, and preserves the rights of both parties.

In the cause at bar, the defendant obtained no order from the court, for the delivery of the property, and the plaintiff perfected his appeal, and filed a supersedeas bond, within four days, and during the term. He could do no more. He

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was prompt, and did all that could be required; and we think he has saved his rights; that the appeal suspended the operation of the judgment; and that the property attached is still liable. It should be remarked, that no question touching the rights of third persons arises here, and that the question is decided without reference to such.

The judgment of the District Court is reversed.

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Where no part of the evidence in a cause, is brought before the appellate court, nor anything to show the pertinency of instructions asked and refused that court cannot determine the applicability of the instructions, or that they were improperly refused.

Where a party clearly brings himself within the law, in applications for a change of venue, and no special circumstances are shown, as that prior continuances have been granted, or something of that kind, it is the duty of the court to grant the motion; and a refusal to do so, may, and will, be reviewed by the appellate court.

The law does not contemplate that a party is entitled to a continuance, *only* in the event that a witness is absent by whom he can *fully* prove a particular fact; but, if from the witness, he can obtain testimony tending to substantiate particular facts—or, if his testimony will materially assist in determining the issues joined—he has a right to the presence or deposition of the witness, unless there is some other witness by whom the same facts can be substantiated, to the same extent as they would be by the absent witness. STOCKTON, J., *dissenting*.

It is that which the absent witness would swear to, if present, that the affiant claims the benefit of, by his affidavit; and when he swears that he knows of no other witness by whom he can prove such fact or facts, as *fully* as he can by the one then absent, he complies with the statute.

A party applying for a continuance on the ground of the absence of a witness, need not state in his affidavit, that he cannot fully prove—that is, that he cannot fully substantiate or demonstrate by any other witness, the facts or matters he expects to prove by the absent witness. If he knows of no other means within his reach, by which he can supply the defect in his testimony, occasioned by the absence of the witness named, and makes this, as well as the other matters required by the Code, to appear, he substantially complies with the law, and should have time, ordinarily, to obtain his proof.

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Appeal from the Polk District Court.

THIS action was commenced before a justice of the peace, to recover for the services of one Andrew Lynch, under a contract, and by defendant appealed to the District Court. In that court, he applied for a continuance on account of the absence of a witness, which application reads as follows: "James C. Savery, being duly sworn, deposes and says, he is the defendant in the above entitled action; that if this cause is continued until the next term of this court, he expects to be able to prove by J. R. Andrews, of Council Bluffs, in the state of Iowa, that defendant paid plaintiff in advance, twelve dollars for and on account of the labor, for the value of which this action was brought; that there was a contract between the defendant on the one part, and plaintiff on the other, that the boy Andrew, was to work for defendant one year; that the said boy Andrew, ran away from defendant and his employ, before the expiration of said time, and continued away from defendant's employ in the Everett House, where, by the contract, he was to have worked; that defendant knows of no other witness, by whom such facts can be fully shown; that said witness, J. R. Andrews, has for a long time been from his residence in Council Bluffs, so that defendant could not take his deposition, to be used on the trial of this cause, and could not in any way procure his testimony to be used on the trial of the same. Defendant further says, he has been writing for the purpose of getting the testimony of said witness, and has been informed, that said witness was away, and still is away, from his residence, and is at some place unknown to defendant; but that he was to be at Fort Des Moines, some time in July, 1856, when and where his deposition could be taken, to be used on the trial of this cause, but that he has not been here, and is still expected." This application being overruled by the court, the trial proceeded, during which the defendant asked certain instructions, which were refused, and which, under the decision of the court, it is not neces-

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sary to state. Judgment was rendered for the plaintiff, and the defendant appeals, assigning for error, the overruling the motion for a continuance, and the refusal to give the instructions asked.

Brown & Elwood, for the appellant.

J. E. Jewett, for the appellee.

WRIGHT, C. J.[1]—No part of the testimony is before us, nor is there anything to show the pertinency of the instructions asked and refused, and the most that can be claimed for them is, that they might possibly be correct under a certain state of proof. Not being advised as to the proof in the case before us, we cannot judge of their applicability, and cannot therefore say that they were improperly refused.

We are then left to inquire whether the application for a continuance was correctly overruled. We have examined the affidavit with some care, and are unable to see upon what ground the ruling below was based. It is true that two affidavits were made on different days, the first one being substantially defective.

The second one, however, stands upon a basis and presents grounds, so substantially different from the first, that it cannot be claimed with justice, that the defendant had no right to be heard upon such second application. This objection being thus obviated, we must look to the sufficiency of the affidavit. As already intimated, we think it complies, substantially and fully, with the law. And we see no reason why defendant was not, under the most strict rule, entitled to his continuance.

Where a party clearly brings himself within the law, in applications of this character, and no special circumstances are shown, as that prior continuances have been granted, or something of that kind, it is the duty of the court to grant the motion, and a refusal to do so, may and will be, reviewed

[1] STOCKTON, J., dissenting.

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by this court. It is said, however, that this affidavit is defective in that the affiant states, that he knows of no other witness by whom the facts detailed can be as fully proved, as by the one alleged to be absent, whereas the law requires that he shall state that he knows of no other witness by whom the facts can be fully proved. In our opinion, however, the objection is without weight. The law does not contemplate, that a party is entitled to a continuance, only in the event that a witness is absent, by whom he can fully prove particular facts or a particular fact. But, if from the witness, he can obtain testimony, tending to substantiate particular facts, or if his testimony will materially assist in determining the issues joined, he has a right to his presence, (or deposition,) unless there is some other witness by whom the same facts can be substantiated, to the same extent as they would be by the absent witness. It is that which the absent witness would swear to, if present, that the affiant claims the benefit of by his affidavit, and when he swears that he knows of no other witness by whom he can prove such fact or facts, as fully as he can by the one thus absent, in our opinion he complies with the law. Under our practice, the adverse party may admit, that the witness, if present, would swear to the facts stated, and thus avoid a continuance; but he is not required, as formerly, to admit the truth of the matters thus stated, or have his cause continued. Nor, on the other hand, need the party applying state in his affidavit, that he cannot fully prove, that is, that he cannot fully substantiate or demonstrate, by any other witness, the facts or matters which he expects to prove by the absent witness. But if he knows of no other means within his reach, by which he can supply the defect in his testimony, occasioned by the absence of the witness named, and makes this as well as the other matters required by the Code appear, he substantially, and we think even technically, complies with the law, and should have time ordinarily to obtain his proof. Because, therefore, this continuance was improperly refused, the judgment is reversed and cause remanded.

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STOCKTON, J., dissenting.—I dissent from the opinion of the court as to the sufficiency of the affidavit for a continuance. The defendant asked for a continuance on account of the absence of J. R. Andrews, by whom he swears that he expects to prove certain facts which are stated in the affidavit, and he further says that he "knows of no person by whom the same facts can be as fully proved as by said Andrews."

In my opinion this is not sufficient. For aught that appears, there may have been other persons by whom everything necessary for his defence could be proved, within the reach of the process of the court, whom the defendant might have called as witnesses. He has no right to assume that he can more fully prove them by Andrews. The statute requires him to show what diligence he has used to obtain the testimony, the name and residence of the witness, and what particular facts he expects to prove by him, and he must state on oath that he knows of no other witness by whom the same facts can be fully proved. This the defendant has not done by his affidavit. By stating that he knows of no other person by whom the particular facts will be as fully proved as by Andrews, he authorizes the court to infer that there are other persons within his reach, by whom, in the language of the law, "such facts can be fully proved."

For these reasons, I think that the affidavit was insufficient, and that the continuance was properly refused.

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It is not true in all cases, that in order to plead a former judgment in bar of a subsequent suit, both the parties, and all the parties, must be identically the same.

Where in an action to recover for the rent and occupation of a mill, under a lease, the defendant, alleging, with other defences, that the plaintiff had brought a former suit against him, on a different cause of action, while the said lease was existing, and in that suit, had sued out a writ of attachment, and attached his cattle, carts, wagons, logs, lumber, and other property and material, by which and for which he carried on the business of the mill, by means of which he was interrupted in the use of the mill, and could not run the same, and so the use and occupation thereof was lost to him for a long space of time—wherefore, and by reason of which, he is not liable for the rent of the mill; and where the plaintiff replied, that the defendant had, (prior to the present suit,) brought an action against the plaintiff, for the wrongful suing out the said attachment, in which action the said defendant pleaded the same matters which are now pleaded in this action, to wit: the attachment of the said property, by and with which, the said mill was carried on, as a ground for the recovery of damages, and that the said matters were permitted to go to the jury, and were heard and tried, in which action the said defendant recovered damages; and where the plaintiff offered in evidence, the record of the proceedings in the action for wrongfully suing out the attachment, to which the defendant objected: 1. Because the former suit was not between the same parties; 2. Because, on the trial of the former action, the court instructed the jury, that the then plaintiff could recover only for damages sustained prior to the commencement of the action, which objection was sustained, and the evidence excluded; *Held*, That the court erred in excluding the evidence.

Appeal from the Wappello District Court.

THIS action was brought to recover for the rent and occupation of a mill under a lease. The defendant pleaded, with other things, that the plaintiff had brought suit against him, (relating to other matters,) while the above lease was existing, and in that suit had sued out an attachment, and had attached his cattle, carts, wagons, logs, lumber and other property and material, by which and for which he carried on the business of the mill, by means of which he was interrupted and prevented in the use of the mill, and could

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not run the same, and so the use and occupation thereof was lost to him for a long space of time—wherefore, and by reason of which, he is not liable for the rent of the mill. The plaintiff replied, that the defendant had, (prior to this present suit,) brought an action against this plaintiff, to recover damages as for a wrongful suing out of the said attachment, in which action the said Milburn pleaded the same matters which are now pleaded, to wit: the attachment of the said property, by and for which the mill was carried on, as a ground for the recovery of damages, and that the said matters were permitted to go to the jury for consideration, and were heard and tried; and it appears that in that action, Milburn recovered damages to the amount of three thousand five hundred dollars, the full amount claimed in his petition, and that, in fact, the jury found a verdict for four thousand five hundred dollars, but this being above the plaintiff's claim, he entered a remittance of one thousand. Upon Davis offering the record of the foregoing cause in evidence, on the trial of the present one, the defendant objected, and the objection was sustained. Exceptions were taken to certain instructions given by the court, which will be found stated in the opinion of the court. Judgment was rendered for the defendant, from which the plaintiff appeals, assigning for error, the rejection of the evidence offered, and the giving of the instructions.

H. B. Hendershott and H. C. Caldwell, for the appellant.

The plaintiff, to establish the issue raised by his replication, offered to introduce in evidence the record of the judgment in the suit brought by *Defendant v. Plaintiff and his sureties*, on the attachment bond. To the introduction of this record the defendant objected: 1. Because it was not in a suit between the same parties; 2. Because the judge on the trial of the suit for damages, had instructed the jury that he could only recover the damages sustained by him up to the date of the commencement of the suit, and that the record did not therefore show that his whole claim for damages had

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been adjudicated. The court sustained the objection, and refused to permit the record to be introduced in evidence. The court erred in this ruling:

1. Because the plaintiff's (in this case defendant,) claim for damages was an entire and indivisible claim; and a judgment for any amount, is a bar to any further suit or offset. *Miller v. Covert*, 1 Wendell, 487; 1 Greenleaf Ev. 641, note 5, also 644, note 2.

2. Because the record shows he claimed his whole damages and got all he claimed. The objection that the judge instructed that he could only recover the damages sustained up to date of suit, is not tenable, because, 1. The instruction is not law, and if they were prejudiced by it, they must correct the error in that suit by appeal, or writ of error. 2. The record shows defendant was not prejudiced by the instruction, because he got all he claimed. 3. The record shows further, that the court instructed the jury to give plaintiff "all the damages he had sustained," and that, to say the least of it, the instructions of the court are conflicting. The record presented a *prima facie* case, and the court ought to have permitted it to go to the jury, and erred in refusing so to do. 1 Greenleaf Ev. § 532. The record shows that the plaintiff (Milburn) in that suit, claimed damages for loss of profits and delay occasioned by the attachment, and for all the damages and injury sustained by him, and recovered all he claimed by his suit, and all he could legally recover in that suit. The presumption of law is, that he recovered all the damages he sustained and was placed in *statu quo*, or as nearly so, as dollars and cents could place him. The defendant is bound by the record of this judgment. *Marsh v. Pier*, 4 Rawle, 243; 1 Greenleaf Ev. §§ 531, 535. It makes no manner of difference, that the record shows that the judgment was against Davis and his sureties. The true question is, who "are the real parties?" 1 Greenleaf Ev. § 535. In other words, can Milburn now sue Davis alone for damages, and prevent Davis from setting up and offering in evidence this record, because in that record the sureties of Davis were also sued? If two commit a trespass

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and are jointly sued, and there is a joint judgment, can one of the defendants afterwards be sued, and deprived of the right to show a former recovery, because the parties are not the same?

2. The court erred in giving the following instruction to the jury, to wit: "That if Milburn did struggle ineffectually to run the mill during the time sued for, but failed to do so with profit or success, during the said time, on account of the wrongful suing out of the attachment, then the verdict should be for the defendant." In giving this instruction, the court did certainly err. No eviction is set up in the answer, or pretended. He occupies our mill, is not evicted, retains possession, uses the machinery of the mill and the mill property, the only thing leased to him, makes no offer of a surrender, gives no notice that the attachment has practically operated as an eviction; but after enjoying the full and undisturbed possession of the leased premises and using them, comes in and asks to be released from paying any rent at all because he could not run the mill "with profit or success." See 4 Cowen, 581.

C. C. Nourse and *A. Hall*, for the appellee, cited no authorities.

WOODWARD, J.—The plaintiff sues for rent. The defendant pleads that he was interrupted in the use and enjoyment of the lease, by the operation of the plaintiff's writ of attachment. The plaintiff replies that the defendant has sued and recovered damages for that interruption. This reply is in the nature of a bar, and not of a set-off. The only question is, whether Milburn can recover damages for the interruption, and also plead the interruption as an excuse for not paying the rent. We think he cannot. That the subject matter pleaded is the same, is very probable. The amount which he recovered is strong evidence that he recovered for this, for upon an examination of the declaration and pleadings in the former suit, it would seem impos-

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sible to sustain the verdict upon any other assumption. But whether this is so apparent or not, is immaterial. It is sufficient that Milburn included it in his claim for damages, and that it was heard and tried. To the introduction of the record of that former suit, in which Milburn so recovered against Davis, Milburn objects: 1. Because the former suit was not between the same parties with the present one. 2. Because, on the trial of the former cause, the court instructed the jury, that the then plaintiff could recover only for damages sustained by him, prior to the date of the commencement of the action; and that, therefore, the record did not show that his whole claim for damages had been adjudicated.

As to the first of these two grounds of objection. The former action was brought on the attachment bond, against Davis, the principal, with Shepherd and Mayne, his sureties in the bond. It is not true in all cases, that in order to plead a former judgment, both the parties, and all the parties, must be identically the same. Such a case as the present one forms one of the exceptions. Davis was the sole meritorious party in the former action, the others being only sureties on the bond. There was no question of right, title or interest, in which they were conjoint with Davis, to be settled. The only matter of that nature was between Milburn and Davis, and if the original common law order of suing in such a case, still prevailed, this would appear. Then Milburn would have to sue Davis alone, in the first instance, to determine whether the attachment had been sued wrongfully, and to settle the damages; and then, if they were not paid, he would sue the sureties, with the principal on the bond. By the modern practice, we sue on the bond in the first instance. But this mode of proceeding cannot affect the substantial rights of parties in the other bearings of the case. See authorities cited by appellant's counsel. The second objection to the admission of the record of the former suit, was that Milburn, in that suit, could not recover for damages accruing subsequently to the commencement of it. This is true. But

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yet, if he brings his action too soon, it is his own misfortune or fault. His cause of action was one and indivisible, and he could not sue again; and for the same reason, he cannot make the use he now seeks, of the subject matter of it. It appears perfectly manifest that Milburn cannot both recover for the interruption of the use by Davis, and also refuse to pay rent for the use. This would be equivalent to recovering twice for the same thing. And on the first point, the case put by plaintiff's counsel, is pertinent. If two commit a trespass, and are sued jointly, and there is a joint judgment, can one be afterward sued, and deprived of the right to show the former recovery, because the parties are not the same? The record should have been admitted in evidence.

The next error is assigned upon the following instruction, given by the court, at the request of the defendant: "If Milburn struggled ineffectually to run the mill, during the time sued for, but failed to do so with profit or success, on account of the wrongful suing out of the attachment, then the verdict should be for the defendant." This instruction was given upon the basis that the record of the former suit could not be made evidence as a bar, and that Milburn might yet recover further for the same cause of action, though for damages accruing subsequently to the former suit; and as this was an error, so was the giving the instruction, however correct it might have been in the former suit. Upon the same ground, that is, the ruling of the court that the former cause of action could be inquired into in this suit, the plaintiff requested the court to instruct that the suing out the attachment must be willful, as well as wrongful, in order to constitute a ground of action or defence, which the court rightfully refused. The plaintiff further requested the court to instruct, that if the plaintiff believed that the defendant was about to dispose of his property, &c., he had a right to sue out the attachment. The refusal of both these instructions was correct, upon the ground that the former suit could not have been inquired into, having been previ-

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ously disposed of. As to the doctrine of these instructions, see the case of *Mahnke v. Damon & Co.*, 3 Iowa, 107.

The judgment of the District Court is reversed.

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By an executory devise, a freehold may be made to commence *in futuro*, and no particular estate is necessary to support it; and where the future estate is to arise upon some specific contingency, the fee simple is left to descend to the heir at law, until such contingency happens.

The number of contingencies is not material, if they are to happen within the limits allowed by law; and the only question is, whether they are to happen within a reasonable time.

For the purpose of carrying into effect the intent of the testator, courts will sanction any mode pointed out by him, consistent with the rules of law.

The intent will not be set aside, because it cannot take effect as fully as the testator intended, but it will be allowed to work as far as it can.

Where there is a present, immediate devise, there must exist a competent devisee, and a present capacity to take; but if there exists in the bequest, the least circumstance from which to collect the testator's intention of anything else than an immediate devise, to take effect *in presenti*, then, if confined within legal limits, it is good as an executory devise.

Where lands are granted to individuals, for the use of a church, which at the time of the grant is not incorporated as such, the persons to whom the grant is made, stand seized to the use, and when the church receives legal capacity to take and hold the real estate, the statute executes the possession to the use, and the estate vests.

Where J. M. being desirous, (as the deed recites,) to promote the cause of true religion in the town of Keokuk, and in consideration of one dollar, in hand paid, conveyed certain real estate to C. and four other persons, and their successors, as trustees, in trust, for the use, benefit and support of an orthodox Congregational Church at the town of Keokuk, *to be called and named* the Congregational Church of Keokuk, and said trustees were instructed and enjoined, to appropriate the land conveyed, and every part thereof, and all moneys arising from the sale, lease, or rent thereof, to the use, benefit, and support of the first orthodox Congregational Church *which shall be organized* at the said town, under the title aforesaid, and until such church shall be organized at the said town, the said trustees shall invest all such moneys, and allow them to accumulate for the benefit of said church, *until the period of such organization*; and where the trustees on the day of the execution of the deed, accepted the trust in writing, and agreed to execute the same; and where the said J. M. after the execution of said deed, in his

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last will and testament, bequeathed certain real estate to his executors, in trust for his children, and to be conveyed to said children at the expiration of ten years from the date of said will, upon certain conditions, and if either of said children, in the judgment of said executors, failed to comply with such conditions, then the share of such child, was to be conveyed to the said trustees, for the use and support of a Congregational Church at Keokuk; and where the trustees, after the death of the testator, took possession of the real estate so conveyed, and subsequently a Congregational Church, bearing the name indicated in the deed, was organized; 1. *Held*, That the gift to the church, in contemplation of its organization, was valid, and the use good; 2. That the gift was a charity in its largest and most comprehensive sense, as understood either in morals or in law, and a trust in the narrow and more restricted sense, as applied to conveyances between individuals, which courts of equity have always recognized and enforced; 3. That the estate vested in the trustees, until the beneficiaries for whom the charity was intended, were in a condition to call for the application of the fund in the hands of the trustees; 4. That the use was not bad, because the trustees named in the deed, had no power to organize the church, or bring it into existence.

Courts are acting judicially, as long as they effectuate the intention of a donor.

Appeal from the Lee District Court.

THIS cause was heard and decided at the June term, 1856, and will be found fully reported in 2 Iowa, 315, to which the reader is referred for a statement of the facts of the case. At that term, after the decision was announced, ~~Marshall, one of the defendants,~~ filed the following

J. W. Hall, Esq.

PETITION FOR A REHEARING:

S. T. MARSHALL, one of the defendants and party in interest in this case, now comes and petitions the court for a rehearing in this case, upon the following points, and prays for time to present a written argument.

FACT 1. That the title under and upon which he claims, was a purchase for a full and *bona fide* consideration from the heirs of James McKean, before there was any Congregational Church organized or contemplated in the city of Keokuk, and before the trustees under the deed to Chittenden and others, had in any manner reduced the premises to possession.

POINT 1. That, judicially and legally, the use remained in the grantor, McKean, and his heirs, and although the deed is evidence of an intention on the part of McKean, yet that intention was not executed in such a manner as can be upheld, upon any judicial principle, and if upheld at all, it must be by the prerogative power of the court.

FACT 2. That the intention of the grantor was to establish an Orthodox Congregational Church—strictly a pious use—limited to an association of persons holding a specific faith, and entirely distinct from a public dedication.

POINT 2. That there is a distinction between what the law terms a public dedication of real estate and a grant or devise for a limited pious use. The former is general, permanent—not subject to change, and the use and purpose of the grant becomes certain and beneficial as soon as made, as it imparts its benefits to surrounding and neighboring property. Dedications depend upon no persons, or class of persons, and can never fail, except by manifest abandonment. The latter are partially limited by a fact, transitory and incorporeal. The foundation is opinion or faith.

FACT 3. That when Marshall purchased from McKean's heirs, he knew of the existence of the deed to the trustees, but he had no knowledge of the presence or Congregational belief of those persons who resided in or about Keokuk, who held that doctrine, or of any intention of persons to form a church of that character. He had notice of one branch of facts necessary to pass the title from McKean; but as it is admitted that there must be beneficiaries, immediate or remote, he had no notice upon that subject, nor of facts that should put him upon inquiry.

POINT 3. That the deed from McKean to Chittenden and others, imparted only notice of its contents, and the other facts necessarily existing *in pais*, should at least exist in such a form that inquiry would disclose it, as the *bona fide* purchaser should be protected; every fact necessary to divest the grantor of his title, should be embraced in the notice.

That in carrying out the intention of the grantor, law will not complete what has been left undone by the grantor; the

act of the grantor must fix the character of the estate. If it is not so fixed, no judicial power can supply the defect.

FACT 4. That no act that has transpired since Marshall's purchase, could prejudice his title. That title was good or bad when he received it; if good, it could not be defeated by a subsequent organization of a church; if bad, it could not revert into a good title by a more extended laches of the church organization.

In urging upon the court, and insisting that this cause shall be opened for further investigation, consideration and argument, I know that there can be but one excuse—a thorough and deep conviction, after a full and careful reconsideration and re-examination of the principles involved in the decision, that the judgment of the court is erroneous, and that the error can be demonstrated and made apparent. With this conviction thoroughly fixed upon my mind, confirmed by a careful, and (as far as I am capable,) a candid examination of the very able opinion of the court, I now present the "judicial logic," and insist that this court shall stop and review the great principles passed upon in the examination of this case.

In urging this application to the court, I feel that I venture far, and hazard an imputation upon myself of "over zeal and stubborn persistence," after a full, careful, and labored investigation has fixed the wrong upon my cause. I know how repugnant it is to return and relabor a task already believed to be done. I feel the difficulty that lies in my path, in attempting to satisfy this court that a further investigation will compel it, as the dispenser of pure justice and enlightened law, to change this decision. It is not intended to renew the discussion upon all the points originally presented. Nearly all of them are satisfactorily disposed of in the opinion of the court.

The error in the conclusion of the court, consists in a misconception of the true distinction between judicial power—judicial action—and prerogative power—prerogative action.

The constitution of the state of Iowa limits and defines the powers of the courts of this state, to judicial power, and

their sphere to purely judicial action ; hence the court has very properly decided, that if they cannot uphold the grant from McKean to the trustees, without resorting to prerogative power, that it will not be upheld.

In discussing and examining this question, it must be borne in mind that the English authorities, where the doctrine of charities arose, and the American authorities, who have borrowed and followed the English, have combined and mingled the prerogative and judicial powers ; and that they declare that to favor these donations, they will assume and exercise powers not judicial, but prerogative. This court should not be misled by these decisions, but should carefully discriminate, and find the separating line between the two powers, and confine its action to the exercise of judicial power alone.

Prerogative, according to the English law, and it is the same with American, is "an arbitrary power vested in the executive department of the government, to do good, and not evil." Coke, Litt. 90 ; Rutherf. Inst. 279 ; 5 Bacon, A., 486, title Prerogative : 2 Bouvier's L. D. 370. Under the constitution of our state, it is impossible for this power to exist, except by constitutional provision or legislative enactment.

Prerogative, when applied to the doctrine of charities, under the English constitution and government, operated upon the property, and arbitrarily retained it, for the purpose of carrying out the express or implied intention of the grantor or deviser. The term *cy pres*, as applied to charities of this character, is merely words used to indicate one branch of prerogative power. Where the devise could not be carried out in accordance with the words of the deviser, the estate was still held by the prerogative power of the government, and used for some other charity, approximating as near as practicable, the one indicated by the donor. When, to save the estate from the heir, the crown resorted to this approximate disposition of the property, it was called *cy pres*, as contradistinguished from the general and universal application and exercise of this power.

The judicial power of this state is a co-ordinate branch or power of the government. The courts represent and exercise the powers of that branch of the government. They cannot make law. They cannot fix the relations between persons and property. They must follow and enforce the law, whether good or bad. They are not arbitrators, but the interpreters of the law. They cannot interpose their power to destroy or to uphold, only when the law has fixed the *status*, and authorized judicial action.

To the courts of this state, the constitution and the law have confided the duty of ascertaining and declaring what the law is, and enforcing the mandates and judgments when rendered. They can investigate and decide upon the rights of persons and the right of things; private rights and public wrongs, in accordance with known and established law: and here their duty ceases, and here their powers are at an end. Indeed, to use the word power, in defining the real duty of courts, is deceptive. It is not the exercise of power; it is the naked science of ascertaining rules that exist, and applying those rules to the facts, which the case under consideration demands from the laws of the land. To ascertain and declare what the law is, is not the exercise of a power.

On the 25th day of December, 1846, John McKean executed a deed for the land in controversy, to A. B. Chittenden and others, in trust, and for the use and benefit and support of an Orthodox Congregational Church at the town of Keokuk, to be called and named the Congregational Church of Keokuk. At the time the deed was executed, there was no church of that denomination in Keokuk, in an organized or unorganized form; nor was there any associated body of persons to which the grantor referred, or intended to refer. The church, which was to be the beneficiary, was not in existence, nor was there any power to bring it into existence. There was no existing law, rule, or power, from which such an institution would certainly emanate.

McKean died in March, 1847. In August, 1849, defendant, Marshall, purchased the land for a valuable considera-

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tion, from several of the heirs of McKean, and immediately thereafter filed his petition in Chancery against the trustees to vacate the trust and have the title quieted and decreed to him, which petition was heard, and the Supreme Court of the State adjudicated in his favor, but remanded the case back to the District Court, where the same is now pending.

In 1852, the present petition was filed. In February, 1854, a Congregational Church was organized in Keokuk. Previous to that organization, a number of persons had resided in Keokuk who professed to hold the Congregational faith, but had attached themselves to the Presbyterian Church, under some arrangement with that organization.

It is about seven years from the date of the deed from McKean to the trustees, to the organization of the church. It is nearly five years after Marshall purchased from the heirs of McKean, and filed his bill to set aside the conveyance and have this title quieted, before any church was organized. At the time the church was organized, the suit of Marshall and the suit of Miller were both pending. The title upon which those suits were based, had been made nearly six years. Now the question is, whether Chittenden and the other trustees have acquired the title to the land in controversy, by purchase from McKean, under the deed of December 25th, 1846, or whether Marshall acquired title under his purchase from McKean's heirs, in August, 1849. These titles are here brought together, and must be tested by rules of law. There is no failure of trustees. Their deed is in form and without exception. There is no fraud, mistake or accident, or trust, as between these titles; one or the other party has the title, without the aid of a court of equity. Marshall purchased whatever right, title and interest the heirs had at the time he obtained the conveyance. Whatever Marshall acquired by the purchase, he still holds.

The conveyance from McKean to Chittenden and others, passed a naked legal title, and in terms excluded the possibility of their having an interest or use. The use was separated from the legal title. The *cestui que use* indicated in

the deed, was not in existence; so that it was impossible for it to vest. It must return to the vendor. The absence or non-existence of a specific object of the grant being apparent in the deed itself, fixes this position.

Now it is distinctly asserted in the case of *Trustees of P. B. Association v. Hart's Ex.*, 4 Wheaton, 1, that where there are no particular persons designated, who are the individual objects of the testator's bounty, there is no *cestui que trust* to claim its execution; consequently, the estate is not disposed of. And this particular principle asserted in that decision, is expressly preserved by Story in *Vidal v. Gerard's Executors*, 2 How. 127. There is no conflict in those decisions on this point. This same doctrine is fully recognized in *Wheeler v. Smith*, 9 How. 55, by that court, some years after the decisions in the other cases.

The Town of Powlet v. Clark, 6 Cranch, 336, relied upon by the court, I think when fully understood and applied, fully establishes the doctrine we contend for. In that case, it appears that in 1761 a royal grant was made to a number of persons, of land, in the town of Powlet. In the grant was "one share of five hundred acres for a glebe for the Church of England, as by law established." There was no established religion; but every town was by law required to support and maintain some kind of religious worship. There was no church established in that town of that denomination, prior to 1802, and that not in accordance with the canons of that church. After the Revolution, and after Vermont became separated from New Hampshire, and succeeded to all the rights of the crown, to the unappropriated as well as appropriated glebes, in 1781, a law was passed putting these lands into the charge of the selectmen of the town. In 1794, the state granted the entire property in the glebes to the town, for the sole use of religious worship, and authorized the selectmen to lease and recover these lands. In 1795, the act of 1794 was repealed, and in 1805, all the glebes were given to the towns for the use of schools, and the selectmen were authorized to lease them, &c.

In 1802, there was, in the town of Powlet, a society of

Episcopalians, duly organized under that denomination, known as the Church of England. They employed a Mr. Chittenden, a regularly ordained minister of that church, to preach for them, and gave him the glebe in question, who leased it to defendant, Clark, and others, who went into possession, and Chittenden received the rents. Chittenden died in 1809, and a Mr. Bronson, a regularly ordained minister, officiated there, and received the rents and profits of the land until September, 1811, when the Rev. Stephen Jewett became the regular pastor of that church.

It will be seen here, that the contest was between the schools and the church—the church claiming under the royal grant of 1761; the schools under the statutes of 1784 and 1805.

The following propositions are clearly decided by the court:

1st. That the royal grant was a dedication for the use of the church, which could have no existence without such endowment, and consequently the title remained in abeyance for the consecration of the church.

2d. That inasmuch as the citizens of the town had by law, to maintain religious worship, they were invested with a right to the use.

3d. That after the grant was made, the crown could not retake the land to itself, without the consent of the town, and the church, if there was one.

4th. That after the Revolution, the state of Vermont succeeded to all the rights of the crown, in relation to these lands.

5th. That if before the passage of the act of 1794, there had been a regularly organized church, according to the rules and laws of the Church of England, the act of 1784 could not have divested them of the use, without their consent and the consent of the town.

6th. That the church organized in 1802, was too late. The town being the only *cestui que use* in existence in 1784, had the right to assent, and with that assent, the state could change the entire character of the grant, and give it to schools.

Now, I think the principles presented in this case, clearly show that if there had been no town or municipality in the territory of Powlet, the state of Vermont could have exercised perfect dominion over the lands.

The church in that case lost the lands, because they were not organized in 1794, and the right of the state to change the grant is fully recognized. The English crown was in the place of McKean; the state of Vermont, McKean's heirs; the town of Powlet, Marshall; the Church of England, the Congregational Church. Before the Church of England (the Congregational Church) was organized, the state of Vermont, heir to the English crown, resumed power over the grant, and conveyed it to Powlet (Marshall). The title was held good to Powlet; (bad to Marshall).

Beatty & Richey v. Kurts et al., 2 Peters, 566, and particularly referred to by this court, it is believed, upon careful examination, will demonstrate the proposition and principle contended for by me. In the opinion of Justice STORRY, it will be found (page 583, 584) that he puts the decision upon the Bill of Rights of Maryland, which gave validity "to any sale, gift, lease or devise of any quantity of land not exceeding two acres, for a church, meeting, or other house of worship, and for a burying-ground, which shall be improved, enjoyed or used for such purpose." And he says: "We think there, it (the donation) might at all times have been enforced as a charitable and pious use, through the intervention of the government as *parens patriæ*, by its attorney-general or other law officer." Now I must insist, that here in Iowa, where we have no such bill of rights, and the doctrine of prerogative power of *parens patriæ*, is denied, this decision, which is based upon that power, has no application whatever. In no sense can the doctrine of that case apply. There, the proprietor of Georgetown had dedicated a lot; it had been entered upon and occupied by persons claiming the right, for fifty years, without molestation.

In the case at bar, the donation is reclaimed, and sold to Marshall, for a valuable consideration, before a solitary claim was interposed, or a single right vested, or a claimant was

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in existence. There is not a vestige of similitude between the two cases. There was an intention and appropriation in that case; in the case at bar, there was an intention, but that intention was withdrawn, and the land sold for a valuable consideration, before the intended beneficiary had an existence.

The case of *Winslow v. Cummings et al.*, 3 Cushing, 358, does not embrace the principle in this case.

Winslow devised a sum of money to the Marine Bible Society. There was no such society; but there was an organization unincorporated, which the court found by evidence was the one the deviser really intended. This society was not the beneficiary. They were themselves but the benevolent instruments of charity to the sailors, marines, &c., as a class of persons who have been the objects of enlightened charity. The court properly decreed that the appointment of a trustee would obviate all objections, and that the fund should be used in accordance with the will of the donor, in furnishing the Bible to the sailors and marines. The decision was put upon the express ground, that the "object of the legacy, and the particular use to which the testator appropriated it, could be ascertained; that it had a well defined object of charity, and mode of distributing its funds, which could be carried out, and effectuate the intention of the testator." The question was not even suggested in the case, that there were no persons who could receive the benefit of the money, but it turned wholly upon the existence of a benevolent association, who should become mere trustees in distributing it to the objects to favor whom the society was formed.

The case of *Inglis v. Snug Harbor*, 3 Peters, 99, is referred to as "a case very much in point." This case shows that Robert Richard Randal devised a large estate in the city of New York, to the chancellor of New York, the mayor and recorder of New York, &c., in trust, to erect and build, upon some eligible situation of the land upon which he resided, an Asylum or Marine Hospital to be called the Sailors' Snug Harbor, for the purpose of supporting aged, decrepid and worn out sailors, &c. The will

continues by requiring an act of incorporation, in case it is found necessary, and that if the devise should be like to fail, on account of or for the want of legal form, that his relations or heirs who should take the property, should hold the same for the use therein indicated.

The only question in the case upon this point, as appears in the opinion of Justices THOMPSON, JOHNSON and STORY, was the capacity of the trustees named to take the estate. The question as to the beneficiaries did not arise, nor was it made in the argument. Justice STORY reiterates the doctrine in *Philadelphia Baptist Association v. Hart's Executors*, 149. With due respect, I must express the opinion that this case throws no light upon the question, unfavorable to the doctrines that I contend for.

The case of *City of Cincinnati v. White's Lessee*, 6 Peters, 429, is also referred to as in point. A careful examination of this case will show a very different question from the one at bar. The opinion follows the doctrine laid down in *Beatty v. Kurtz*, 2 Peters, 586, and *Powlet v. Clark*, 9 Cranch, 292, that in cases of public dedications, it does not require a grantee; that the owner of the land when dedicated, would himself be seized for the use designated; but the idea that a party as a trustee could stand seized to a use, before the object is in existence which is to be the recipient of the dedication, is not entertained or discussed in that decision, but the controversy is between the beneficiaries and the donor.

If A. should lay out a town or city upon unimproved land, and dedicate by writing on the plat or by parol, streets, but before selling any of the lots or property, should conclude to resume dominion, and should do so, could the public enforce the dedication and avoid the resuming act of the original owner? The case of *Powlet v. Clark*, clearly decides this point. The donor or his heir can resume his donation any time before the *cestui que use* is in a condition to receive, but when the use becomes vested, his power to resume the interest ceases, although no legal title has been vested in trustees. The law makes the donor a trustee for the use indicated. This is the extent of the doctrine, and it

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is only by confounding the trust with the use and making them synonymous, that any other conclusion can be arrived at. In the case at bar, the trustees are not denied or their condition controverted, but the Congregational Church, which must be the recipient and beneficiary, being in the same condition as the Episcopal Church in Vermont, in 1794 and 1805, where the state resumed dominion over the glebe of Powlet, and disposed of it, we say, has lost the use, by the resumption of this property by McKean's heirs, and disposing of it to Marshall. The court say (438): "And after being thus set apart for public use and enjoyed as such, and the private and individual rights acquired with it, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication." "It is a violation of good faith to the public, and to those who have acquired property with a view to the enjoyment of the use thus publicly granted." Again (440): "There is no particular form or ceremony necessary in the dedication of land for public use. All that is required, is the assent of the owner of the land, and the fact of its being used for the purposes intended by the appropriation." Now suppose that there had been no enjoyment of the dedication by the public—no private or individual rights acquired with reference to the dedication; that it had never been used for the public purposes intended by the appropriation, would the owner be estopped and precluded from revoking the dedication? Clearly not; and this is the turning point in the case. There must be a dedication and beneficiaries. This is clear and incontrovertible.

Having now reviewed the decisions on this subject, made by the Supreme Court of the United States—made when that bench was filled by the ablest jurists of the age, it will be useless to proceed further. Yet the opinion may be ventured that no respectable court has, since those doctrines have been fully passed upon by the Supreme Court of the United States, doubted their validity, or controverted the law, as laid down by that court. The decisions of that court have been made in controversies arising in several

different states, and the doctrines have assumed a character to meet the peculiar local doctrines of the different states. Hence, we see decisions where the doctrines of prerogative and *cy pres* are admitted, as in New York and Maryland, and where they are not, as in Virginia, &c. From these decisions it may be affirmed with implicit confidence, that :

1st. A donation, grant or devise, for a public or pious use, will never fail for want of a grantee or trustee.

2d. That where the object to be benefited by the donation, grant or devise, is not in existence, or is of so indefinite a character that the court cannot superintend the distribution, the grant fails, or can be resumed by the grantor.

The principle is an obvious one, and is based upon the rule at common law that applies to all donations. A gift without possession or occupancy, is void, and cannot be enforced. A trust with possession, when there is no one to receive the use, can be reserved by the donor at pleasure. The trustee, having no interest, cannot complain. There is no other person interested or identified, who can complain ; hence, there can be no remedy.

I now come to the opinion of the court in this case, which I insist is erroneous. The error consists in not carefully distinguishing between the true rule that exists between the donor and the *cestui que use*, but by confounding the doctrine that pertains to the donor and trustee with that of the *cestui que use*. The law that controls all donations or gifts, prevails in regard to charities and pious uses.

It is well settled that a gift without delivery, is void. *Noble v. Smith*, 2 John. 52 ; *Granger v. Arden*, 10 John. 298 ; *Pearson v. Pearson*, 7 John. 26 ; *Pitts v. Mangune*, 2 Bailey, 588.

Without contending that there must be actual possession, either in the trustee or beneficiary, in case of charitable donations, yet it is certain that there can be no charity or use created, without an object upon which to bestow the charity, or a person to receive the use. At any time before the use is vested, it may be revoked. The conveyance by McKean's heirs to Marshall, and his suit commenced in 1849, was a complete revocation ; and no subsequent organ-

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ized church could become seized of a use of this land. The dedication, grant or gift, was incomplete until the beneficiary came into existence and was capable of receiving, and until that happened, it could be revoked by McKean or his heirs. Now in law, can this title or use remain in abeyance, in spite of McKean and his heirs? Was the land so disposed of and sold, that they could not revoke and resume dominion over it? It must be borne in mind that the sale to Marshall for a valuable consideration, and Marshall's subsequent possession, is as solemn an act of revocation and assertion of dominion as could be done by the party.

The opinion of the court decides this question to a certain extent. The court say: "We are asked if this grant is sustained, how this court could have ordered its execution, if the church was not organized, or if required to do so before the organization? We answer that in such a case the grant would not have been upheld. In other words, we could not have given it to a beneficiary that at the time had no capacity to take."

This court, then, would not have upheld this title as against Marshall, at the time of his purchase. It was then, not a title that could be sustained in law; nor would this court have upheld this title, up to the very day of the organization of the church, which was five years after Marshall purchased, and nearly that time after he had appealed to the court to have this revocation and his title quieted. If Marshall had been so fortunate as to have brought his suit to a termination after four years' litigation, this court would have adjudged his title good. Now, could anything but the omnipotent power of prerogative, snatch the estate from the certain grasp of Marshall, after these four years of conceded right and indefeasible title? Surely, nothing but the ultra doctrine of *cy pres* can sustain such a singular condition of real estate. There is no principle of law that leads to this conclusion. Surely, upon every rule of law and equity, when Marshall purchased and sued for his rights, if he was entitled to a judgment, no act of the adverse litigant could debar him of that right. He had a right to the land when he purchased; he has it now.

The most that can be said is, that McKean, by deed, expressed his intention to donate this land to a charitable use, and died avowing that intention ; but his death transmitted that intention to his heirs ; he carried no power or control with him to the grave, but left all to his heirs. They revoked that intention, as he could have done. They had as full power as he had. They sold the land for a valuable consideration, at a time when there was no interposing claim, and before the intention had become executed or any right vested.

The question arises whether the law will uphold this intention, or whether it requires prerogative. It is not a case of a lapse, for an estate can only lapse where it has begun and is abandoned—it lapses for non-use. In this case, it never began ; it is in the precise situation that the Episcopal Church was in the town of Powlet. The estate had been otherwise disposed of, before the church was organized to take the glebe.

Upon what legal principle can this estate be said to rest in abeyance, after McKean's heirs have conveyed to Marshall for a valuable consideration—for what? Not for want of a trustee to hold, but for the want of a subject upon which the bounty can be bestowed. This doctrine would simply say : that the conveyance was made as an experiment. The estate was nobody's—belonged to no one—could be used by no one for an indefinite, but reasonable time for a church to organize ; but if no church was organized within that time, then the estate was McKean's.

Now, the only difference between this doctrine and the doctrine of prerogative, as acted upon in England, is, that the prerogative power held it for that or some other approximate purpose. The doctrine of this court uses the prerogative power, to hold it for a time in spite of the party, and then if the object of the charity does not appear, the court gives the property back to the owner. In other words, the court uphold the estate from the owner to find the owner, and then give it to the owner, unless in the meantime an owner is created.

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In Adams' Doctrine of Equity, 68, it is said, "that where an apparent charitable intention has failed, whether by an incomplete disposition at the outset, or by subsequent inadequacy of the original grant, effect may be given to it by a *cy pres*, as an approximate application, to the exclusion of a resulting trust for the donor." Now I insist that the donation by McKean was incomplete, and that a court of chancery has no power to complete it; that McKean in his lifetime, and his heirs after his death, held this as a resulting trust, and in abeyance (if you please), just so long as the original intention continued, and no longer; that the entire unincumbered estate necessarily remained in McKean and his heirs, and was subject to their will, and that a *bona fide* purchaser without any notice, except what the deed gave, took the fee simple title in accordance with the deed, and not an inchoate contingent title; that when this court interposes a power to uphold this estate, independent of any parties, such power is not judicial; that it is the exercise of a prerogative power, and it is so laid down in books.

There are several incidents that transpired after the conveyance by McKean to Chittenden, that have assumed an importance in this decision, which I forbear to discuss in this argument, believing that a careful recurrence to the authorities, and greater deliberation upon the true and established principles governing property in these cases, will at least satisfy the court, that justice and the cause of truth require that this case shall be opened for a re-argument.

The petition for a rehearing was taken under advisement, until the December term, 1856, when the following opinion overruling the petition for a rehearing, was filed.

STOCKTON, J.[1]—The objection taken by Marshall, to the claim set up by the trustees to the land conveyed to them by McKean, is, "that at the time the deed was ex-

[1] WOODWARD, J., dissenting.

ecuted, there was no Congregational Church at Keokuk, in an organized or unorganized form; nor was there any associated body of persons to which the grantor referred or intended to refer." The conveyance from McKean to Chittenden, passed a naked title; and, in terms, excluded the possibility of their having an interest or use. The use was separated from the legal title. The *cestui que trust* indicated in the deed, was not in existence, so that it was impossible for it to vest. It must return to the vendor. We state the position assumed by Marshall, in the words of his counsel. It may be stated by them in different form and language, but it always comes to the same thing—there was no church in existence to take the beneficial interest in the property conveyed; the trustees had no power to bring the church into existence; and the conveyance to Marshall, by the heirs of McKean, was a revocation of the grant.

In the first place, we have to say, that it was not contemplated by McKean, that the church was organized at the date of the deed, and the gift was not one *in presenti*, to take effect immediately upon its execution. It is for the use, benefit and support of the First Orthodox Congregational Church which shall be organized at Keokuk, that he gives the land. He directs the trustees what they shall do with the land, until such church is organized. He knew there was no such church then in existence, and it was to aid in its organization and support, that the donation was made. If, then, McKean's heirs were entitled to the land, the deed was void *ab initio*. It conveyed no interest to the trustees, and it is immaterial whether they took possession of the land or not. It is immaterial how many Congregationalists there were in Keokuk at the time of its execution. It is immaterial whether the church has since been organized or not. There was no beneficiary in existence at the time, to take the trust estate, and therefore no interest passed. Such is the position and argument for Marshall. It will not, perhaps, be controverted, that by an executory devise, a freehold may be made to commence *in futuro*, and no particular estate is necessary to support it. The future estate is to arise upon

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some specific contingency, and the fee simple is left to descend to the heir at law, until such contingency happens. 2 Blackf. 175. The number of contingencies is not material, if they are to happen within the limits allowed by law. The only question is, whether they are to happen within a reasonable time. 3 Peters, 115. In *Inglis v. Trustees Sailors' Snug Harbor*, the devise was to an association unincorporated, on its becoming incorporated. It was sustained by the court, on the ground that it did not purport to be a present devise to a corporation not in being, but a devise to take effect *in futuro*, upon the corporation being created; and the contingency was held not to be too remote. For the purpose of carrying into effect the intention of the testator, courts will sanction any mode pointed out by him, consistent with the rules of law. They will not set aside the intent, because it cannot take effect as fully as the testator intended, but let it work as far as it can. 4 Vesey, 325; 12 Mass. 543; 3 Binney, 162. It has been held, that if the corporation for whose use the property is intended, is not *in esse*, and cannot come into existence, but by some future act of the crown, the gift is valid, and the court will execute it. *White v. White*, 1 Bro. Ch. 12. In such instances, the distinction must be observed between a devise to take effect *in presenti*, and the same devise to take effect *in futuro*. In the *Baptist Association v. Hart's Exrs.*, 4 Wheaton, 1, the court considered the bequest gone for uncertainty as to the devisees, and because the society, not being incorporated, was incapable of taking the trust. But if the testator in that case, had bequeathed the property to the Baptist Association, on its becoming, thereafter, and in a reasonable time, incorporated, there could not have been a doubt but that the subsequent incorporation would, even in the opinion of the court deciding that case, have conferred on the association the capacity of taking and managing the fund. 3 Peters, 114. The court would have felt itself bound to carry out the intention of the testator. It is the general rule, says JOHNSON, J., in *Inglis v. Sailors' Snug Harbor*, 3 Peters, 144, that where there is a present immediate devise,

there must exist a competent devisee, and a present capacity to take. But it is equally true, that if there exists the least circumstance from which to collect the testator's contemplation or intention of anything else than an immediate devise, to take effect *in presenti*, then, if confined within legal limits, it is good as an executory devise. In *McIntyre Poor School v. Zanesville Canal and Manufacturing Company*, 9 Ohio, 208, it was held, that a bequest to charitable uses, may take effect as an executory devise to a corporation subsequently acquiring a capacity to take; and in the following cases it has been held, that a devise to a future incorporation is good: *Porter's Case*, 1 Coke Rep. 22; *Coggeshall v. Pelton*, 7 Johnson Ch. 292; *Mylne v. Mylne* 17 Louisiana Ch. 46.

The questions discussed in the case before us, arise under the deed by McKean to the trustees, and not under a devise by will. For Marshall, it is claimed, that this conveyance passed no estate, for the purposes of charity, because there was, at the time, no Congregational Church organized and in existence, to take the beneficial interest. In respect to conveyances between individuals, it is well settled, that every deed must have sufficient certainty as to the grantee who is to take under it. If it cannot be known who is to take, the grant is void, for the uncertainty. So, where the *cestui que trust* is incapable of taking the gift, the intervention of trustees does not remove the difficulty. And in general, it may be stated, that there is the same necessity for a *cestui que trust*, capable of taking the beneficial interest, that there is for a properly defined grantee in a deed. In this case, there must either be a *cestui que trust* capable of taking the use, or some overruling reason, why it should not be governed by the well settled rules of law; otherwise, the estate descended to the heirs of McKean at his death. Was the use bad to which McKean conveyed the land? The question is not whether the gift was void, because the church was not in existence. McKean knew the church was not organized. It was not a mistake on his part, in conveying to the use of a church, which was afterwards discovered to have no existence as a church organization. It

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was not a conveyance to take effect *in presenti*. The grant is to the trustees, to appropriate the land, and all moneys arising from the sale, lease or rent thereof, to the use, benefit and support of the First Congregational Church which shall be organized at Keokuk. And until such church shall be organized, the trustees are to invest all moneys arising from the sale, lease or rent of said land, and allow them to accumulate, for the benefit of the church, until it is organized. The question then is, was the gift by McKean to the church, in contemplation of its organization, valid? Was the use good?

- Such conveyances have been held good in Maine, in the case of *Shapleigh v. Pillsbury*, 1 Greenleaf, 271; in Massachusetts, in the case of *Rice v. Osgood*, 9 Mass. 38; in New York, in the case of *Reformed Dutch Church v. Veeder*, 4 Wendell, 494; and in the Supreme Court of the United States, in the case of the *Town of Powlet v. Clark*, 9 Cranch, 292, (3 Curtis, 358.) In these cases, it has been held, that if the lands are granted for pious uses, to a person or corporation not *in esse*, the right to the custody and possession of the lands remains in the grantor, until the person or corporation intended, shall come into existence, but the donor cannot resume the grant. If, on the other hand, the grant is made to individuals for the use of the church, which at the time of the grant is not incorporated as such, the persons to whom the grant is made, stand seized to the use, and when the church receives legal capacity to take and hold the real estate, the statute executes the possession to the use, and the estate vests. 4 Wend. 497. In *Powlet v. Clark*, STORY, J., says: "A donation by the crown to the use of a non-existing parish church, may well take effect by the common law, as a dedication to pious uses. After such a donation, it would not be competent for the crown to resume it at its own will, or alien the property, without the same consent which is necessary for the alienation of other church property." "Before such church were duly erected and consecrated, the fee of the glebe would remain in abeyance, or at least, be beyond the power of the crown to alien, without

the ordinary's consent." 9 Curtis, 332. As to the object to which McKean was desirous of dedicating a portion of his estate, there can be no mistake. He prefaces his donation, by declaring himself "desirous to promote the cause of true religion in the said town" of Keokuk. He sought to provide for the organization and support of an Orthodox Congregational Church at that place, and for the promotion of "the cause of true religion" there, by means of the preaching of the gospel to its people by ministers of that order. But, can it for a moment be supposed, that the beneficial results sought to be accomplished, were intended by him to be limited to the communicants, or members of the organized church? That would be a very narrow view of the benefits to be conferred by the donor's bounty, which would restrict it to the Congregational Church, whose organization was contemplated in the deed to the trustees. The beneficiaries were to be confined to no such narrow limits. The fund was, indeed, to be retained until the particular church was organized. It was to be administered, if you please, and "the cause of true religion promoted," by means of denominational teachers, holding the peculiar views and opinions in religious doctrine and church government understood to be entertained by Orthodox Congregationalists. But we think we can clearly see that it was within the contemplation of the donor, that every inhabitant of Keokuk, of whatever order, faith, or persuasion, was to receive the benefits of his bounty, and share in its effects. They were all the beneficiaries, and the gift was a charity in its largest and most comprehensive sense, as understood either in morals or in law, and a trust in the narrow and more restricted sense, as applied to conveyances between individuals, which courts of equity have always recognized and enforced. "It is now too late," says STORY, J., 3 Peters, 482, "to contend that a disposition to favor charity, can be construed according to the rules which are applicable to individuals." McKean desired this church to be organized and supported in Keokuk, not alone that it might be the means of furnishing religious privileges and instruction to those who, from time

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to time, might become its members, but as the best means presented to him, of conferring a benefit upon the whole community in which it should be established.

This disposition to favor charity, was manifested by setting apart a portion of his estate for the support of the gospel, through the means and instrumentality of the Congregational Church. There was no pecuniary consideration for the conveyance to the trustees. That was not necessary. Other considerations, quite as effectual and sufficient, moved him. The support of the gospel in a Christian country, is a sufficient consideration. 4 Wendell, 496. The objection that there was no beneficiary to take the use, is not sustained, either in law or fact. By direction of the grantor, and according to his intention, the estate vested in the trustees, until the beneficiaries for whom the charity was intended, were in a condition to call for the application of the fund in the hands of the trustees. Such appropriations have been held valid, upon principles other than those which ordinarily apply between grantor and grantee, and are supported as dedications, to public and pious uses. 2 Cranch, 583.

Is the use bad, because the trustees named in the deed of McKean, had no power to organize the church, or bring it into existence? Although the trustees had no power to organize the church, in the sense in which they might, under a power conferred by deed or will, establish "a school for indigent scholars," (1 Hawkins, 97,) or a college for the education of orphan children, (2 Howard, 127,) or an asylum for disabled seamen, (3 Peters, 99;) yet there was a duty devolved upon the trustees by the grantor, which shows that it was contemplated by him, that the fee should remain in them, subject to the capacity to be acquired by the persons of the Congregational faith in Keokuk as an organization, to require the appropriation and application of the fund. They were to sell, lease and rent the land, and invest the moneys arising therefrom, and allow them to accumulate, until the church was organized. Although the church may not have been at this time in existence, there was still something to be done by the trustees, before the

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use was to vest. In what respect does the principle on which such a grant may be sustained, differ from that established in *Shapleigh v. Pillsbury*, *The Reformed Dutch Church v. Veeder*, and *Powlet v. Clark*? Wherein does it differ from that which Judge STORY says was established by *Porter's Case*, 1 Coke Rep. 22, "that if a feoffment is made to a general legal use, not superstitious, though indefinite, though no person is *in esse* who could be the *cestui que use*, yet the feoffment is good?" 3 Peters, 487. Courts are acting judicially, as long as they effectuate the intention of the donor. 4 Dana, 366.

In sustaining the grant to the trustees in the present case, we will not be supposed desirous of exercising any other than judicial powers in carrying out the intention of McKean, as manifested both in his deed and his will. In one class of cases, it has been held, that the doctrine of *cy pres*, as administered in England, is a judicial doctrine, in which cases a court of equity may substitute or sanction any other mode that may be lawful or suitable, and which will effectuate the declared intention of the donor. *Moore's Heirs v. Moore's Devises*, 4 Dana, 355; *Attorney-General v. Wallace's Devises*, 7 B. Monroe, 611. There is no necessity, however, in this case, for a resort to any such doctrine. No inadequate, illegal or inappropriate mode has been prescribed by McKean for making his charity available. The mode prescribed by him has not failed. The trustees are ready and willing to carry it out on his own scheme, and the objects to be effected are identified and ascertainable. There is, therefore, no occasion for the exercise of a power, in England deemed a part of the prerogative of the sovereign, as *parens patrie*.

It is claimed for Marshall, that he purchased the interest of McKean's heirs, for a valuable consideration; that the right to resume the grant was in McKean at his death, and descended to his heirs; and that by their conveyance, Marshall became possessed of a complete legal title to the land, which no subsequent organization of the church could divest. We admit that if Marshall's title was ever good, it is

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good still. But it will readily be perceived that his title may be adjudged good and sufficient on one statement of facts made to the court, when it would not be so deemed when the whole or additional facts were made to appear. It might well be deemed sufficient, on demurrer to the bill in Chancery filed by him, to set aside the deed to the trustees, when it would be considered wholly insufficient when tested by all the facts shown in the record now before us. What right had the heirs of McKean to this land? and what right had they to convey it to Marshall? McKean himself had manifested no disposition to resume the grant, up to the time of his death. By his will, made a short time before his decease, so far from intimating any such desire or intention, he confirms the grant, rather, and so far, such confirmation may be inferred from its express recognition. If the donation had been, and the land conveyed, for the benefit of a Congregational Church, which the donor erroneously supposed was in existence at Keokuk; if, at the time of McKean's death, and for a reasonable time thereafter, there had been no persons of the Congregational persuasion in Keokuk; if no attempt had been made to organize and establish a Congregational Church there; if the trustees had not accepted the trust, and taken possession of the land; and if there had been no recognition and confirmation of the grant by the testament and last will of the donor, the case might have presented such a state of facts, and there might have been such a failure of the *cestui que trust*, as that the heirs of McKean would have been entitled to resume the grant. But there is an entire lack of every essential element towards making out the state of case on the part of Marshall, the claimant under the heirs. In the first place, the gift to the church was not to take effect *in presenti*, but only at such future and reasonable time as the church should be organized—the fee, in the meantime, remaining in the trustees, with power to sell, lease and rent the land, and accumulate the proceeds until the period of such organization. In the second place, it is shown, that at the time of McKean's death, and since, there were persons of the Con-

gregational faith and persuasion residing at Keokuk, who being few in numbers, did not deem it advisable to establish a church in that place, until the funds arising from the charity of McKean, should be sufficient to furnish the means of supporting it, without too heavy a pecuniary burden upon themselves. Many of these persons were united temporarily with the Presbyterian Church of Keokuk, which, being identical in doctrine, so modified its discipline and church government as to render it substantially a Congregational Church. In the third place, it is shown, that at no time had the intention been abandoned of organizing such a church, so soon as the number and means of its friends became sufficient to sustain it; and that in the year 1854, an Orthodox Congregational Church was organized in Keokuk, for which the trustees, under the deed of McKean, are now claiming the land in controversy, as dedicated by him, to its use. In the fourth place, it is shown, that immediately after the death of McKean, the trustees took possession of the land, leased a portion of the same, and that their possession has continued ever since; that this litigation respecting the title, commenced in 1849, shortly after the purchase by Marshall from the heirs; that the church would long since have been organized, and the benevolent intention of McKean carried into complete effect, but for the obstacles thrown in the way of such a consummation, by the very litigation which the claimants under the heirs have caused; and but for the cloud they have thereby cast upon the title of the land, whereby, for all practical and useful purposes, it has been rendered unavailable; and finally, it is shown, that by the will of John McKean, executed in February, 1847, he recognized the conveyance made by him to the trustees, and the purposes for which it was made, and provided that other lands, by him devised to certain of his heirs, upon condition, should, on the failure of such condition, be vested in the same trustees appointed by his deed, for the same use and purposes therein mentioned.

We have to say, in conclusion, as an apology, if any

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should be deemed necessary, for this second opinion in this cause, after the full and able opinion of the chief justice, delivered at the June term, that after that opinion was delivered, a petition for a rehearing was filed by Marshall, the claimant under the heirs of McKean, and the cause was, in effect, re-argued by the counsel on both sides. The court have reconsidered the cause, both with reference to the new authorities cited, and others which have come under their notice. We have not been disposed to deny to the party, against whom, we have felt obliged to give our decision, the fullest opportunity of being heard, consistent with our other duties. This was due alike to the magnitude of the questions adjudicated, and to the ability and earnestness with which views, the opposite of our own, have been urged by the counsel. It is necessary, however, that the discussion should cease at some time, and the litigation be brought to an end. Having seen no good reason to change the views heretofore announced, the petition for a rehearing is overruled.

WOODWARD, J., dissenting.—On a re-examination, and a more thorough investigation of this cause, under the petition for a rehearing, I am obliged to differ from the majority of the court, so far as to think that a rehearing ought to be granted. I am not satisfied with the decision as it is, and the doubt might involve some question as to that in *Johnson v. The Methodist Episcopal Church*, also, *Ante*, 180. The subject is too large to permit an examination of it at present, but I wish to hold myself at liberty upon it, if it again arises.

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WILLIAMSON v. WILLIAMSON.

Where a party seeks to divest another of the legal title to real estate, on the ground of a parol gift, upon conditions, which he alleges have been complied with by him, the burden of proof is upon him to sustain the allegations of his petition, when they are denied by the respondent.

Equity, as well as the law, contemplates that all contracts relating to real estate, shall be evidenced by some writing, signed by the party to be charged; and when it is sought to bring a case within any of the exceptions allowed to avoid the operation of the statute of frauds, the court should never be left to act upon conjecture, or upon proof loose and indeterminate in its character.

Where a party seeks to take a cause out of the operation of the statute of frauds, upon the ground of a part performance, it is indispensable that the parol contract, agreement or gift, should be established by clear, unequivocal and definite testimony; and the acts claimed to have been done under the contract, should be equally clear and definite, and referable exclusively to the contract or gift.

Appeal from the Wappello District Court.

IN Chancery. The son, Robert, claims of Henry, the father, a deed for a certain parcel of real estate, which he alleges was given to him by his said father. The bill sets up a parol gift, upon condition that complainant would settle upon said land; avers that he did, under said agreement, enter upon and make improvements thereon; that he was in possession some two or three years; and that respondent refused to make the deed, but compelled complainant to quit said possession. The answer denies all the substantial averments of the bill. To sustain the complainant's action, several depositions were taken, the substance of which is as follows:

John G. Baker testified, that he knew nothing of any contract between the parties; that he had heard respondent say, that he had given complainant the land, and that complainant lived on the land some two years, and made some improvements upon it. On cross-examination, this witness stated, that in the conversation referred to above, the re-

4	279
79	510
4	279
81	88
4	279
92	71
4	279
111	864
4	279
116	518
4	279
138	472
4	279
141	718

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spondent did not deny giving the complainant the land, but said he had been badly treated by him and his wife, and had concluded not to make him a title.

Samuel Haxton testified, that, in 1851, he heard the respondent say, he had bought the land on purpose for complainant; that he should have it, if he would go on it, and live on it; that he did not want the land for himself at all, and that he had land enough without it; that complainant moved a house on to the land the next fall, and moved into it about the first of January; that he hauled out rails, and built a fence around a lot for his cattle; that he lived upon the land about three years and three months; and that there were no improvements on the land, at the time respondent spoke of having bought the land for the complainant. When cross-examined, the witness stated that respondent said, in the conversation referred to, that he bought the land for the complainant, and intended to give it to him, if he would live on it; and that complainant moved off the land in April, 1855, and sold the cabin and part of the rails.

David Whitcomb testified, that he was assessor of Richland township in 1853; that when respondent gave in his tax list, he stated, in reply to a question asked by the witness, that the list embraced all his land, except one forty, which belonged to the complainant, who was present, and could give it in. Upon cross-examination, he stated that he could not be certain whether respondent said, that the complainant owned the land, or lived on the land, or whether he said that complainant had possession of the land, and ought to pay the taxes.

John A. Bevans testified, that he had heard the respondent repeatedly say, that he had given the complainant forty acres of land; that complainant had been a good boy to him; that it was his intention to give him a start in the world; and that he intended to make him a deed for the land—this was about three years ago; that about two years ago, he heard the respondent say, that he was not going to carry out his agreement with complainant about the land; that he said, that his reason for not doing it, was, that he

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understood the complainant was going to sell the land, and put some one on it to pester him with their stock, and that he had heard respondent say, that as soon as the deed came on, he should have it.

John D. Devin testified, that, as the agent of Edwin Manning, he entered the land for the respondent, on time; that before the expiration of the credit, the respondent notified him, that within a short time he would pay off his note; that at the request of the respondent, he wrote to Mr. Manning, and had a deed forwarded in the name of the complainant; that the respondent called, and took up his note; that he then said, that he did not wish the deed in the name of the complainant, but wanted one made directly to himself; that another deed was accordingly sent for, and delivered to him some time afterwards; and that the deed was made in December, 1852.

On the hearing, the bill was dismissed, and complainant appeals.

Knapp & Caldwell, for the appellants.

Williams, for the appellee.

WRIGHT, C. J.—Counsel do not differ as to the legal or equitable rules and principles which must govern in the decision of this case. The substantial question is whether, under the testimony, the complainant is entitled to the relief claimed by his bill, and this issue must be decided in favor of respondent. To refer to all the testimony, is entirely unnecessary, and especially so, when such reference would in this opinion, answer no valuable purpose. We content ourselves, therefore, with stating two grounds upon which the decree below may clearly be sustained. The first is a want of clearness in the proof as to the agreement, and the compliance therewith as set up in the bill. The legal title is in respondent. Complainant seeks to divest it by proof of a parol gift upon conditions, which he says have been complied with by him. To sustain these averments,

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when denied by the answer, the burden of proof is peculiarly upon him. If a party would take a case out of the statute of frauds, upon the ground of a part performance, it is indispensable that the parol contract, agreement, or gift should be established by clear, unequivocal and definite testimony; and the acts claimed to be done thereunder, should be equally clear and definite, and referable exclusively to the said contract or gift. Equity as well as law, contemplates that all contracts relating to real estate, shall be evidenced by some writing signed by the party to be charged; and when it is sought to bring a case within any of the exceptions allowed to avoid the operation of the statute, the court should never be left to act upon conjectures, or upon proofs loose and indeterminate in their character. Story's Eq. Jurisp. § 764, *Noel v. Noel*, 1 Iowa, 423. In this case, the proof is not only loose and indefinite as to the terms, conditions and character of the gift, but equally so as to the alleged compliance with such terms or conditions. But we are further of the opinion, from the testimony, that complainant voluntarily abandoned the premises and his possession, and waived thereby all right or claim to a deed. The proof is that he sold the house built thereon, as also the rails, and left the land about nine months or a year before bringing this suit. This house, and the laying up of those rails, constituted substantially the improvements made by him. No sufficient reason is shown for this abandonment. If the proof establishes any gift, it shows it to have been upon condition that the son should take possession and live upon the land. Having failed, as far as we can see, without just cause, to comply with this condition, he is in no situation to demand a performance on the part of the father.

Decree affirmed.

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Section 1778 of the Code, was designed to prevent the unjust determination of a cause, on account of an accidental or inadvertent omission of a party to call a witness, or to ask a question on some given point; and was not intended to be limited in its application, to the period of examining witnesses.

The privilege of calling a witness, after the evidence is closed, to prove a fact which has been omitted by inadvertence, is within the discretion and control of the court, as are also the terms to be imposed, if any are deemed just.

Where in an action of trespass, charging the cattle of the defendant with breaking into the plaintiff's close and destroying his crops, the court, after defining a lawful fence, instructed the jury, that whether the fence was a lawful fence, and a good one, was in the discretion of the jury; *Held*, That the word discretion, in its proper sense, implies judgment; and that used in this sense, the instruction was correct.

Where in such an action, the court instructed the jury, that "no man has the right to suffer to run at large, animals of a dangerous kind either to the person or property of another, and if he does, he is responsible for all damages which result from the acts of such animals;" *Held*, That there could be no possible objection to the instruction.

Where in such an action, the defendant asked the court to charge the jury as follows: "That if the jury believe from the testimony, that the domestic animals of other persons beside those of defendant, were in the habit of trespassing on the premises, at the times set forth in the petition, they cannot find that the defendant's domestic animals did all the damage to the premises," which instruction the court refused to give; *Held*, That the instruction involved a question of fact, and was properly refused.

Where in such an action, the defendant asked the court to instruct the jury as follows: "That the jury must be satisfied from the testimony, what amount of damages the defendant's animals have done, before they can find for the plaintiff," which instruction was refused; *Held*, That the instruction was properly refused.

Where in an action of trespass, charging the cattle of defendant with breaking into the close of plaintiff, and destroying his crops, the defendant filed a motion for a new trial, for the reason, among others, that he had discovered new evidence, which motion was supported by the affidavit of the defendant, in which he stated, that he had been informed, and believed, that he could prove by A. M., that A. M. owned a cow that was exceedingly bad about breaking down fences; that said cow was running at large in the prairie at the time the trespass complained of was committed; and that A. M. afterwards sold said cow, because of her frequent trespasses in breaking into various persons' inclosures; that he (defendant) has been informed,

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and believes he can prove, by one P. M., that he was growing a crop in the same inclosure, when the trespasses complained of were committed; and that while at work in the early part of the season, when the cattle first began to get into said inclosure, the fence was first thrown down, and the cattle first led in by the said cow; that he is informed he can prove this last fact, by one J. W.; that the said witnesses reside at a distance from court, and he has not had time, nor been able, to procure their affidavits to file with the motion; that he was entirely taken by surprise by the evidence of the plaintiff, that the fence was thrown down by his cattle, and should have been prepared to show that his cattle were not unruly, and accustomed to break over ordinary lawful fences; and that he expected to be able to prove all the above matters on another trial—which motion for a new trial was overruled by the court; *Held*, That the motion was properly overruled.

Appeal from the Madison District Court.

THIS was an action brought to recover damages for the defendant's cattle breaking into the plaintiff's close, and destroying his crops. On the trial, after the plaintiff had closed his evidence, and had concluded his opening argument, and the defendant also had addressed the jury, the plaintiff moved for leave to introduce a witness, to prove that the land where the damage was done was that described in the petition, which he claimed had been omitted through an oversight. The defendant objected, but the court allowed it. The defendant then introduced a witness to rebut the testimony so offered, and was allowed to, and did make further argument to the jury with regard to that portion of the case upon which such new evidence had been offered. On the submission of the cause, the court instructed the jury, in substance, as follows: That they should inquire whether the land was substantially described, and whether the plaintiff had possession; and that "the plaintiff claims that his crop was destroyed by defendant's cattle. It is important that you determine whether the crop was destroyed by defendant's cattle; whether plaintiff's fence was a lawful fence, four and a half feet high, with spaces sufficiently close; was the fence four and a half feet high, and such as is generally, in this country, recognized as a good fence? This is a matter entirely in your discretion. You will then

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inquire whether defendant's cattle broke into plaintiff's field and destroyed his crop; and if you find that the fence was such an one as comes within the meaning of the law, and such an one as is recognized as a good common fence in the country, and the defendant's cattle broke through the inclosure, the defendant is liable for all the damages resulting from such breach. In such case, it was the duty of the defendant to keep his cattle up, and not suffer them to run at large to the danger of his neighbor's property; and if property was destroyed, he is responsible. No man has the right to suffer to run at large, animals of a dangerous kind, either to the person or property of another; and if he does, he is responsible for all damages which result from the acts of such animals. But if the fence was not a reasonable one, such as would be calculated to protect the property, the crop, and the loss was the consequence of the negligence of plaintiff, and that with ordinary care and prudence, he could have protected the crops, it was his duty to do so; and if he failed to do so, and the fence was such as the custom of the country and the law would not recognize as a lawful fence, he would not be entitled to recover; the loss would be a consequence of his own negligence and fault."

To these instructions, so far as they relate to the fence and the unruliness of the cattle, the defendant excepted. The defendant further requested the court to instruct the jury: 1. "That if they believe, from the testimony, that the domestic animals of other persons, besides those of the defendant, were in the habit of trespassing on the premises, and at the times set forth in the petition, they could not find that the defendant's animals did all the damage to the premises." 2. "That the jury must be satisfied, from the testimony, what amount of damage the defendant's animals have done, before they can find for the plaintiff." These instructions were refused, and the defendant excepted. He then moved for a new trial upon the ground, (beside others,) of newly discovered evidence, and filed an affidavit, stating that since the trial he has been informed, and he believes that he can prove, by one Allen Major, that he owned a

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cow which was exceedingly bad about knocking and breaking down fences, and that the said cow was running at large in the prairie at the time the trespasses complained of were commenced; and that said Major afterwards sold said cow, because of her frequent trespasses in breaking in various persons' inclosures. And, farther, that he has been informed, and believes he can prove, by one Patrick McDuffie, that he was growing a crop in the same inclosure, when the trespasses complained of were committed, and that while at work, in the early part of the season, when the cattle first began to get into said inclosure, the fence was first thrown down by the said cow, and the cattle were first led in by the said cow; and that he is informed that he can prove this last fact by one John Welch; and that the said witnesses reside at a distance from the court, and he has not had time, nor been able to procure their affidavits to file with this motion. He further states, that he was taken entirely by surprise by the evidence of the plaintiff, that the fence was thrown down by [his] cattle, and should have been prepared to show that his cattle were not unruly, and were not accustomed to break over ordinary lawful fences; and that he expected to be able to prove all the above matters on another trial. This motion was overruled. Judgment having been rendered against him, the defendant appeals, and the following are assigned as error:

1. In permitting the plaintiff to introduce a witness after the defendant had closed his argument.
2. In refusing the first instruction asked by the defendant.
3. In refusing the second instruction asked by the defendant.
4. In instructing the jury that whether the plaintiff's fence was a lawful one, and such as is recognized in this country as a good fence, was entirely in their discretion.
5. In instructing the jury that no man has a right to suffer to run at large, animals of a dangerous kind, either to the person or the property of another.
6. In overruling the motion for a new trial.

M. L. McPherson, for the appellant.

Curtis Bates, for the appellee.

WOODWARD, J.—The first error assigned relates to the admission of the witness, after the defendant had closed his argument. Section 1778 of the Code was designed to prevent the unjust determination of a cause, on account of an accidental or inadvertent omission of a party to call a witness, or to ask a question, to some point. It was not intended to be limited in its application to the period of examining witnesses. For this, a statutory provision would not have been thought requisite. The law deems it just that the evidence should be heard, and does not favor that which is denominated "sharp practice." But the privilege is not to be abused. It is within the discretion and control of the court, as are also the terms to be imposed, if any are deemed just. There is nothing to show that the discretion of the court was improperly exercised in the present instance.

The defendant was allowed to introduce testimony in rebuttal, and to present further considerations to the jury on the new evidence offered.

The assignment of error numbered four, relates to the instruction, that the question whether the fence was a lawful fence, and a good one, was in the discretion of the jury. The court repeatedly refers to the statute definition of a sufficient fence. Acts of 1852-3, 174, chap. 105. And as that prescribes the height, in feet and inches, we will not suppose the word discretion refers, in any sense, to that. It is true, that the more ordinary use of this word, with us, implies something more of mere choice than would be consistent with the present application of it. But in its more proper sense, it implies judgment—soundness of judgment. Thus, we speak of a discreet man, and of his discretion; and in this sense, the word applies well enough to those qualities of a fence which are in their nature undefined, as when the statute describes it as "of strong materials, put up in a good

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and substantial manner, with sufficiently small spaces," &c. These things were within their discretion or sound judgment, not in their mere option. The court quite clearly directs the jury that the fence must be one answering to the sense of the law; and if the instruction might be construed as requiring anything more than this—such as that it should be such a fence as the custom of the country called for—this was matter for the plaintiff to complain of, and not the defendant.

To the instruction embraced in the fifth assignment of error, there can be no possible objection.

Of the remaining matters, some present that difficulty of adjudication which arises from vagueness and want of point in the objections. Thus, the second error assigned is, on refusing the first instruction asked by the defendant. The court had before instructed the jury that it was important for them to inquire whether the defendant's cattle did the damage complained of; and besides, this is the very gist of the action, and of which the jury is to inquire. Therefore, the court may, perhaps well enough, have declined to give it, because it was already involved and given. But if the defendant insists upon the instruction, notwithstanding what was already before the jury, then we are obliged to say that it is not true—it is not accurate. Suppose the jury do find that the defendant's cattle did do all the damage, in fact, although other persons' cattle trespassed there, may they not find such a fact? It is possible that other cattle may have entered the close, and not have destroyed the crops. The instruction asked is not one which will warrant a reversal.

As to the third error assigned—the refusal of the second instruction asked by the defendant—the mind is led to doubt whether it understands this instruction. Of course, the jury must find that the defendant's cattle committed the trespass, before they can find for the plaintiff; and upon this alone they would find, at least, nominal damages. It is not perceived to what this aims, since the jury have found damages to the amount of one hundred and fifty dollars, done by the de-

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fendant's cattle, and not by those of other persons. They might find against the defendant, and then disagree as to the amount; or they might find nominal damages. But it is not correct that they must find the amount, before they can find for the plaintiff. It is true that they could not return a verdict into court without finding the amount; or, at least, if they return a verdict for the plaintiff as for a trespass, and could not agree on the damages, such a verdict would carry nominal damages. We conceive that the instruction asked is not correct, if we can imagine any proper meaning for it.

The motion for a new trial is based upon an affidavit of what the defendant is informed and believes he can prove by certain persons. This does not yield sufficient certainty of his being able to prove the facts, if he had the witnesses. But further, if the facts were proved, they would not necessarily change the verdict. And yet more, perhaps they would not even authorize a change. But further, the affidavit rather shows a neglect, a want of preparation of his cause, on the part of the defendant. He says he was surprised by the evidence of the plaintiff, whilst that evidence was on the very gist of the cause, as it was to be proved by the plaintiff.

There does not appear to be any error in the rulings of the court below, and the judgment is affirmed.

THE STATE OF IOWA v. CARR.

In proceedings against bail on *scire facias*, the burden of proof is on the defendant, to show cause why the recognizance should not be estreated.

The execution of the recognizance will be taken as proved, unless denied under oath.

Where in a proceeding on *scire facias* to estreat a recognizance, it appeared from the record, that the warrant for the arrest of the principal, was issued, March 5, 1855; that the recognizance was dated, May 25, 1855; and filed with the clerk of the District Court, June 7, 1855; and that the affidavit of the bail, that he possessed the qualifications prescribed by the statute for

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bail, was indorsed on the recognizance; and where it did not appear from the record, by whom the recognizance was taken or accepted; or that the party accused was under arrest, or required to give bail; or that the amount of the bail had been fixed by the court; or, if the recognizance was taken by a justice of the peace, that he had authority to take it; *Held*, 1. That no such connection was shown to exist between the indictment against the principal, and the recognizance declared on, as would authorize the court to infer that it was part of the record in that cause; or, if so, that it was rightfully a part of it; 2. That the affidavit of the bail as to his qualifications, indorsed on the recognizance, was not sufficient to give vitality and effect to the recognizance, or to show that it was ever taken or accepted as a valid undertaking, by a court or magistrate, of competent authority. Where it does not appear from a recognizance, that it was taken or accepted as a valid undertaking, by a court or magistrate of competent authority, it does not become a part of the record, and no judgment can be rendered against the obligors for the penalty contained therein.

Appeal from the Davis District Court.

SCIRE FACIAS against bail. The defendant appeared, and for cause why his recognizance should not be estreated, answered, denying the execution and acknowledgment of the recognizance, and averring that the recognizance had never been executed, acknowledged and approved, as the law requires.

The answer was not under oath. The recognizance on which the writ of *scire facias* issued, appears to have been signed by defendant, and one J. J. Purcell, and was conditioned for the appearance of Purcell at the next term of the District Court, to answer an indictment against him for selling intoxicating liquors. On the recognizance is indorsed the affidavit of justification of the bail, taken before one S. W. Taylor, a justice of the peace. Nothing appears to show that Purcell was ever arrested or in custody, or that the recognizance of the bail was ever acknowledged, approved or accepted. At the September term of the District Court, the defendant, Purcell, being called, failed to appear, and his recognizance was forfeited, and this proceeding by *scire facias* commenced against his surety. The defendant objected to the introduction of the recognizance in evidence, but the objection was overruled, and judgment rendered against the defendant Carr, from which he appeals.

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Palmer & Trimble, and Knapp & Caldwell, for the appellant.

Samuel A. Rice, Attorney-General, for the State.

STOCKTON, J.—In proceedings against bail on *scire facias*, the defendant is to show cause why the recognizance shall not be estreated, or, in other words, why the conditional judgment of record against him, shall not be made absolute, and execution issued thereon. The burden of proof is on the defendant, when judgment in default of appearance has been entered against the principal. The evidence on which the plaintiff relies is of record, and is presumed to be within the knowledge of the court, and the defendant must show and allege everything that he relies upon to establish the insufficiency or irregularity of the proceedings. The *scire facias* is a rule upon him to show to the court any cause he may allege, why final judgment should not be entered against him.

The defendant in this case answers and avers as cause why it shall not be estreated, that the recognizance was not executed by him, and was not acknowledged and approved as the law requires. Its execution will be taken as proved, unless denied under oath. And the question is, whether it sufficiently appears that the recognizance was accepted by a court or magistrate having competent authority. The Code, section 3310, defines the taking of bail, to consist in the acceptance by a competent court or magistrate, of the undertaking of sufficient bail for the appearance of the defendant, according to the terms of the undertaking, or that the bail will pay to the State a specified sum.

The warrant for the arrest of Purcell, issued March 5, 1855. The recognizance is dated May 23, 1855, and appears to have been filed with the clerk of the District Court, June 7, 1855. By whom it was taken or accepted, is in no way made to appear. The defendant was not under arrest or required to give bail. The amount of bail had not been fixed by the court, and if the recognizance was taken by

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the justice of the peace, no authority for him to take it is shown.

In short, no such connection is shown to exist between the indictment against Purcell, and the recognizance declared on, as to authorize us to infer that it is a part of the record in that cause, or if so, that it was rightfully a part of it.

The affidavit of the defendant Carr, that he possesses the qualifications prescribed by the statute for bail in such cases, is indorsed on the recognizance. But nothing else appears to give it vitality and effect, or to show that it was ever taken or accepted as a valid undertaking by a court or magistrate of competent authority. It is necessary in our opinion that this should appear, to make the recognizance of any force. If it does not so appear, the recognizance does not become a part of the record, and no judgment can be rendered against the obligors for the penalty contained therein.

Judgment reversed.

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Before a prior judgment can be a bar to a subsequent action, the point or matter in issue between the parties, must have been *determined*, and such determination or decision must have been upon the merits.

If a suit shall be discontinued, or a plaintiff shall become nonsuit; or if, for any other cause, there has been no judgment of the court upon the matter in issue, the proceedings are not conclusive, and will not bar a subsequent suit for the same cause of action.

An irregular judgment is conclusive, until reversed or set aside.

Objections not urged in the court below, come too late, when presented for the first time in the appellate court.

Appeal from the Jones District Court.

THIS case was commenced before a justice of the peace, and by defendant appealed to the District Court. The transcript of the justice states that "plaintiff ordered notice to

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issue against defendant for the sum of \$89.37, with interest, as justly due him on an agreement to pay, or on contract." On the day fixed for trial, it is shown that the parties appeared, "with their attorneys, and the plaintiff pleaded orally, and the defendant filed his answer, and a jury being summoned, at the request of the defendant," &c. On appeal, the cause was submitted to the court without the intervention of the jury, and its decision was rendered in writing, stating the facts found, and the conclusion founded thereon. As thus stated, the facts were substantially as follows: In the winter of 1853-4, a controversy existed between these parties in relation to a note held by plaintiff against defendant, and they then mutually agreed to submit said controversy to two persons named, who, after hearing the said parties, awarded that defendant should pay plaintiff the sum of two hundred dollars. To this decision both parties assented, and the defendant at the time promised to pay plaintiff the said two hundred dollars, and subsequently paid thereon \$110.63. In January, 1855, plaintiff sued defendant for the balance claimed to be due, and a trial being had before a jury, they returned "a verdict—no cause of action. The judgment rendered by the justice was, that the plaintiff be nonsuited; and the plaintiff then paid up the costs," and commenced this action. On this state of facts, the District Court found for plaintiff, and the defendant appeals.

W. J. Henry, for the appellant.

W. T. Barker, for the appellee.

WRIGHT, C. J.—Three of the errors assigned in this case may be considered together, as they involve substantially the same question. These are, first, that the court erred in receiving evidence of a submission to arbitrators, and the award, when the said award had not been declared on by plaintiff; second—in finding for plaintiff, when his pleadings do not set forth any cause of action; third—in render-

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ing judgment on a verbal contract, when the said contract related to a promissory note, which was not produced. None of these objections appear to have been urged in the court below, and whatever their force, if made at the proper time, we are clear, that they come too late, when presented for the first time in this court. That it was competent for the plaintiff to declare upon the alleged parol award, or upon the note which was the foundation of said submission, there can be no doubt. In pleading before a justice of the peace, it is not expected or required, that either party shall be held to critical nicety in stating his cause of action or defence. If a plaintiff shall fail to state his cause of action in a sufficiently clear and distinct form, objection should then be taken, or at all events, when testimony is sought to be introduced to sustain the same. But where no objection of the kind is made in that court—where the cause has been heard upon appeal, and this objection not urged—we would not disturb the judgment for a defect in the statement of the claim, if from the whole record, sufficient is shown to enable the defendant to plead the recovery in bar of any subsequent action; and this rule disposes of the three errors assigned. The parties had, as far as can be seen, a full and fair trial—the plaintiff's cause of action is now, at least, fully upon the record, and after judgment, we think, the objections come too late; and especially is this true, when not made the ground for a motion for a new trial, or in arrest of judgment in the court below. From this record, the defendant can have no difficulty in protecting himself against any action that may be brought either on the note or award.

The fourth and last error assigned is, that the judgment should have been for defendant, on the plea of prior adjudication. The defendant before the justice, set up by his answer, the former proceedings referred to in the facts found by the court. As shown by the statement of the case, that cause was tried before a jury, and verdict rendered in these words—"No cause of action." The justice thereupon entered judgment—"that the plaintiff be nonsuited"—where-

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upon the plaintiff paid the costs of said suit, and commenced the present action. Do these facts show such a former adjudication as to bar the present action? We think not. It is to the judgment of the justice that we are to look in determining this question. The verdict of the jury cannot bar the plaintiff's action, unless followed by such a judgment as amounts to a prior adjudication or determination of the matter in controversy. Before a prior judgment can be a bar to a subsequent action, we understand that the point or matter in issue between the parties must have been determined, and such determination or decision must have been upon the merits. If, therefore, a suit shall be discontinued, or a plaintiff shall become nonsuit, or if, for any other cause, there has been no judgment of the court upon the matter in issue, the proceedings are not conclusive, and will not bar a subsequent suit for the same cause of action. *Bridge et al. v. Sumner*, 1 Pick. 871; *Inh. of Knox v. Inh. of Waldborough*, 5 Greenl. 185; 1 Greenl. Ev. §§ 529, 530; 3 Black. Com. 296, 377. It is true that the order that the plaintiff be nonsuited, after the rendition of the verdict, was an unusual one, and we may go even farther, and say that it was irregular; and upon review in the District Court, would perhaps have been set aside. But it was certainly as much the duty of the defendant as plaintiff to have this order corrected. As it stands, we cannot treat it as void. But treating it as simply irregular, it is conclusive, until reversed or set aside, and giving to the language used its usual and recognized signification, it amounts to nothing more than an order discontinuing the former suit, or perhaps ordering a nonsuit for some cause not disclosed. So construing the language, we think the plaintiff's action is not barred by such former proceedings.

Judgment affirmed.

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GOSSELINK v. CAMPBELL.

An ordinance of a municipal corporation can have no extra-territorial force; but persons or property coming within the territorial limits of the corporation, come under its authority.

Where a city charter, adopted in pursuance of the provisions of chapter 42 of the Code, gave to the city council the power to establish such by-laws and ordinances as may be necessary and proper for the good regulation, health and safety of the citizen, and the cleanliness of the city; to prohibit stock from running at large in the city; and to make any other ordinary, suitable and proper police regulations, and to impose fines and penalties for the violation of such regulations, by-laws and ordinances; and where the city council, acting under such charter, adopted an ordinance, prohibiting hogs from running at large, the first section of which provided, that no hogs shall be allowed to run at large in the city, and owners are required to keep them up, and that any person failing to comply with the ordinance, shall be deemed guilty of a misdemeanor, and pay a sum not less than one, nor more than five, dollars; and the second section of which, made it the duty of the marshal to take up all hogs found running at large in the city, and advertise them; and if the owner did not, within three days, come and pay the fine and costs, and take care of the hogs, to sell them to the highest bidder; and after paying the fine and costs, to pay the balance of the money to the owner; and where an action of replevin was brought against the city marshal, by a party residing beyond the corporate limits, to recover the possession of certain hogs belonging to him, found running at large within the corporation, and taken up under the ordinance; *Held*, 1. That the city had authority, under the charter, to pass the ordinance; 2. That the city marshal had authority, under the ordinance, to take up the hogs; 3. That the first section of the ordinance, is within the meaning and spirit of the statute and the charter; 4. That the second section of the ordinance, was sufficient for the abatement of the nuisance and the payment of the charges, but not for the enforcement of the fine.

Appeal from the Marion District Court.

THE plaintiff brought an action of replevin against the defendant, to recover possession of certain hogs, taken up when running at large in the city of Pella, on the 13th June, 1856, contrary to an ordinance of the city. The defendant was marshal of the town, and as such impounded the creatures. The cause was submitted to the District Court, on statement of facts, by which it is agreed, that

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the hogs were the property of the plaintiff, who is a farmer, residing about a mile from the limits of the corporation; that he "had them on his farm," and permitted them to run at large, and that on the 13th June, 1856, they were found within the town limits, and were taken up by virtue of the ordinance in question by the defendant, who was city marshal; that Pella was duly incorporated as a city under chapter 42 of the Code, and that the charter had taken effect before the passage of the ordinance in question. A copy of the charter and of the ordinance is given. By the agreed statement, the following are made as the only questions raised in the case:

1. Had the city of Pella any authority, under the charter, to pass the ordinance?
2. Had the city marshal any authority, under the ordinance, to take up said hogs?
3. Are the provisions of the ordinance legal, and is the marshal justified under it, in taking up the animals?

The statute, charter and ordinance bearing upon the cause, are as follows, in substance: Chapter 42 of the Code provides a method for the self-incorporation of towns and cities. The provisions relating to towns are in the main applicable to cities, but to the latter some extension of power may be given. The governing body is styled by the general term of "local legislature," thus covering any form and name of such body which may be adopted.

The above chapter, section 663, provides that the charter adopted may prescribe and limit the powers and duties of this local legislature, and of the "other officers." Section 665 enacts that the charter may also "give power to establish such by-laws and ordinances as are necessary and proper for the good regulation, safety, health and cleanliness of the town, and the citizens thereof. * * * * * And to make any other ordinary, suitable and proper police regulations, and impose penalties for the violation of any such regulations, which penalties may be collected by civil action in the name of the town." And other sections confer farther powers.

The charter adopted under the above statute authority by

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section 20, gives to the city council the power to establish such by-laws and ordinances as may be necessary and proper for the good regulation, health and safety of the citizens, and the cleanliness of the city; to prohibit stock from running at large in the city, and to make any other ordinary, suitable and proper police regulations, and to impose fines and penalties for the violation of such regulations, by-laws and ordinances. The ordinance in question, by its first section, provides that no hogs shall be allowed to run at large in the city, and owners are required to "keep them up:" and that any person failing to comply with the ordinance shall be deemed guilty of a misdemeanor, and shall pay a sum not less than one nor more than five dollars. By the second section, it is made the duty of the marshal to take up all hogs found running at large in the town, and to advertise them, and if the owner does not, within three days, come and pay the fine and costs, and take care of the hogs, to sell them to the highest bidder; after paying the fine and costs, he is to pay the balance of the money to the owner.

Judgment was rendered in favor of the plaintiff, and the defendant appeals.

J. E. Neal, for the appellant.

Wm. H. SeEVERS and *H. P. Schotte*, for the appellee.

WOODWARD, J.—The only question is upon the validity of the ordinance, for the authority of the marshal depends upon that. As this is a very usual provision in a town or city charter, and as the ordinance is of a very common character, it is not, on first view, altogether apparent, what are the objections intended to be urged against it, and therefore the propositions of counsel will be given as they have advanced them. They say, first, that a corporation has no power to pass by-laws or ordinances which are contrary to the constitution of the State, or of the United States, or to the common law, as it is accepted and received in the juris-

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diction or state in which such corporation exists. This proposition is presumed to be true; but in this, as in some other instances, the doubt or difficulty arises in its application. It is very broad, but is it true, that any restraint upon any and every common law right, is a violation of its true meaning? I have a common, or common law, right to build my house of wood. How then can I be prohibited doing so, and be directed to build of brick or stone? I have a common law right to do many things on my own grounds which are often prohibited in large towns. The direct application which the plaintiff appears to make of this proposition, is by his third, which is, that the rule of the common law of England, requiring the owners of stock to fence them in, has never been in force in this State, but the reverse is the true doctrine. It is sufficient to say, in answer to this, that it is not pretended that that part of the ordinance which requires the owners to keep up their stock, applies to the plaintiff personally, or to any persons residing out of the corporate limits. The ordinance, like a state law, can have no extra-territorial force. But, as in the case of any other law, when persons or property come within its territory, they are under its authority. If it is said that this is a restraint upon his common law right, then we come back to primitive elements. The plaintiff has natural rights, and so have others, and he must so use his as not to injure theirs. As he cannot let his stock run at large at the expense of breaking into his neighbor's field and destroying his crop, so he cannot suffer them to annoy those citizens who constitute a municipal corporation. The principle is not changed by the fact, that our law happens to require the landowner to fence against stock, for the supposed natural liberty of the owner of stock is restrained by his liability, in case his creatures break the fence of his neighbor. The case is also like that of the liberty of speech which one possesses, but for the use of which he is answerable. In fine, the plaintiff's right must be enjoyed in harmony with the rights of others. The legislature may confer upon a town the power to adopt such regulations as these, whether we style them sanitary, police,

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or by some other term. And the plaintiff may permit his creatures to roam unconfined, but if they come within the limits of the town, they come under its laws. It is believed that the true meaning of the rule, that a by-law cannot be contrary to the common law, is, that it must not violate the principles of that law; but the rule cannot be carried to the extent of saying that no common law or natural right can be restrained or abridged.

The statute before referred to, confers ample authority to adopt a charter, with provisions similar to these, and the charter in the present case, in various and in express terms, permits an ordinance, whose object is the same with that before us. Whether it is required to be in any respect different from this one, we will consider under another head. Neither do we apprehend the force of the assertion, that the ordinance is unreasonable, which is the fourth proposition of the plaintiff.

Another, and probably the leading objection made by the plaintiff, is, that no power is conferred upon the town to create a forfeiture of property, and that this ordinance creates one, and is therefore void; this point will be treated as briefly as may be. The terms, fine, forfeiture, and penalty, are often used loosely, and even confusedly. But when a discrimination is made, the word "penalty" is found to be generic in its character, including both fine and forfeiture. A fine is a pecuniary penalty, and is commonly (perhaps always,) to be collected by suit in some form. A "forfeiture" is a penalty by which one loses his rights and interest in his property. See Webster's Dict. and Jac. Law Dict., &c. It is true, as claimed by the plaintiff, that a town cannot pass an ordinance creating a forfeiture, unless clear and distinct authority be given therefor. *Hart & Hoyt v. Mayor and City of Albany*, 9 Wend. 571; *Cotter v. Doty*, 5 Ohio, (Ham.) 394; *City of New York v. Ordreman*, 12 Johns. 122; A. and Ames on Corp., (ed. 1882,) chap. 9, § 8, and seq.; 1 Bac. Ab. tit. By-laws.

The Code, chapter 42, under which this charter is adopted, authorizes penalties to be collected by civil action. A civil

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action is required here to enforce the penalty, and the word "collected" seems to point to fines only. See the cases above. The first section of the ordinance is within the spirit and meaning of the statute and of the charter. But the essential question is, as to the second section, which requires the marshal to take them up, and to sell, unless the owner take them, and pay the fine and costs. Regarded as a mode of enforcing the first section, and of collecting the fine there prescribed, it is defective, both because the organic statute (Code, § 665), requires a civil action for this purpose, and upon the common ground that the fine cannot be thus enforced, without trial and adjudication. This leads to another consideration. Hogs running at large, contrary to lawful prohibition, are regarded in the light of a nuisance. An action to recover a fine is an inapt and inadequate remedy. Whilst the several days' notice required in an action are passing, and even after, the nuisance continues. Such an action does not abate it. The town is expressly authorized to prohibit the running at large of this creature, and also has a power in relation to all nuisances under its authority, concerning the health, cleanliness and safety of the city and its citizens. By the ordinance, the running at large of hogs is made a nuisance. The question now is, whether its second section can be sustained as a method provided for abating such nuisance.

Proceedings for the abatement of nuisances are of a more summary nature than actions, from the necessity of the case. This ordinance does not, strictly speaking, create a forfeiture, for after paying the expenses and fine, the remainder of the proceeds of sale are paid to the owner. It is then, in effect, but the abatement of the nuisance, and as such, is regular. It is sufficient for the abatement of the nuisance and the payment of the charges, but not for the enforcement of the fine. Nor do we apprehend that it can be contemplated to deduct the fine from the proceeds of a sale, in such a case; for the fine is not fixed, and the marshal would not presume to settle it. Especial reference is made to the case of *Hart & Hoyt v. The Mayor and City of Albany*, 9 Wend. 571.

Wales & Son v. The City of Muscatine, Garnishee.

That was a case very analogous to this at bar, but was stronger, inasmuch as the whole of the proceeds of a sale were to be paid into the city treasury. Upon this last ground, the judgment of the District Court will be reversed.

WALES & SON v. THE CITY OF MUSCATINE, Garnishee.

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A municipal corporation may be summoned as garnishee, under the statute of Iowa, and the indebtedness of such corporation to the party defendant, held to respond to the judgment of the plaintiff.

Where a party is garnished as a debtor of the original defendant, and answers, confessing an indebtedness, the original defendant may make any objection to judgment being rendered against the garnishee, which goes to show that the indebtedness is exempt from execution or attachment, or that the judgment is satisfied, or any other defence of a like nature; but he cannot interpose the objection to a judgment against the garnishee, that the garnishee is not liable to the process of garnishment.

The objection that a party garnished, is exempt from the process of garnishment, is a privilege which the garnishee *alone* can assert.

Where the plaintiffs issued execution on a judgment in their favor against B. and the sheriff summoned as garnishees, P, mayor, and J., recorder of the city of M., who, at the ensuing term of the District Court, appeared and answered the interrogatories propounded, from which it appeared, that the city of M. was indebted to B. in a sum certain, for work done on the steamboat landing; and where the plaintiffs moved for judgment against the city of M. for the sum shown to be due B., which motion was objected to by B. and overruled by the court, for the reason that a municipal corporation could not be held as garnishee; *Held*, 1. That B. had no right to make any such objection to the rendition of judgment against the garnishee; 2. That the court erred in overruling the motion for judgment against the city of M.

Appeal from the Muscatine District Court.

THE plaintiffs issued execution on a judgment in the Muscatine District Court in their favor, against Joseph Bennett, for \$2,848.40; and the sheriff notified and summoned as garnishees, John A. Parvin, mayor, and D. P. Johnson, recorder, of the city of Muscatine. At the ensuing term of the District Court, the persons summoned as garnishees, ap-

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peared and answered the interrogatories propounded to them; and from their answers it appeared, that the city of Muscatine was indebted to the defendant, Bennett, in the sum of five hundred and forty-seven dollars and twenty-six cents, (\$547.26,) for work done on the steamboat landing. Plaintiffs thereupon moved the court for judgment against the city, for the amount appearing by the answers to be due from the city to the defendant, Bennett. The motion was overruled by the court, and the garnishees discharged, to which ruling of the court the plaintiffs excepted, and now appeal to this court.

David C. Cloud, for the appellants, cited the following authorities: Code, 266; *Cohen v. Perpetual Insurance Co.*, 9 Missouri, 421; *Home M. Ins. Co. v. Gamble*, 14 Ib. 407; *Hawthorn v. City of St. Louis*, 11 Ib. 59.

George D. Woodin, for the appellee, relied upon *Hawthorn v. City of St. Louis*, 11 Missouri, 59; *Union Turnpike Road Co. v. Jenkins*, 2 Mass. 37; *Wood v. Hartford Co.*, 12 Conn. 404; *Stillman v. Isham*, 11 Ib. 124; *Drake on Attachment*, 497.

STOCKTON, J.—When the case came up for decision in the District Court, on the answer of the garnishees, the defendant, Bennett, appeared by his attorney, and objected to any judgment against the city; and the District Court decided, as appears by the bill of exceptions, “that a municipal corporation could not be held as garnishee, and that no judgment could be rendered against the city in this cause.” It is the defendant, Bennett, who interposes the objection that the city cannot be held as garnishee. The city of Muscatine is not understood as making any opposition, to whatever judgment the court might pronounce, but was ready to pay the money due by it to Bennett, as the court should direct. We first inquire, whether Bennett had any right to make any such question to the court. He certainly had the right, to make any objection to the judgment against the

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garnishee, which would have gone to show that the indebtedness sought to be subjected, was exempt from execution or attachment, under section 1901 of the Code, as being due to him for his personal services. So, he might have shown that plaintiffs were entitled to no judgment against the garnishee, by reason of the satisfaction of the principal judgment, or any other defence of a like nature. But the exemption claimed for the city in this instance, was a privilege which the party garnished, alone could assert; it could not be set up for it, by another. The defendant in the execution is not entitled to interpose the objection, in the name of the city.

But the objection, whether made by the defendant Bennett, or by the party summoned as garnishee, we think is not a valid one. The question is whether a municipal corporation may be summoned as garnishee, under the statute of Iowa, and whether the indebtedness of the city of Muscatine to defendant, can be held to respond to plaintiff's judgment. In *Drake on Attachment*, sec. 497, it is held, that municipal corporations cannot be charged as garnishees, "the same principle being considered as applicable to them as to persons holding effects of defendants in legal capacities." We are cited in support of this doctrine, to the case of *Hawthorn v. The City of St. Louis*, 11 Mo. 59, where it was held, that a public municipal corporation is not like a private corporation, liable to be garnished in Missouri, for a sum due to an officer of the corporation as a part of his salary. It has been the policy of some states to exempt the salaries of public officers from execution or attachment, as it is in our own, to protect from such process the earnings of the debtor for his personal services and those of his family. Code, § 1901. So in Arkansas, it has been decided that the state cannot be garnished for the salary of a public officer. *McMekin v. The State*, 4 English, 558.

It was held, in *Bradley v. Town of Richmond*, 6 Vermont, 121, that an action cannot be maintained against a town, as the trustee or garnishee of an absconding or absent debtor. This decision is placed by the court on the ground

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of the statute of Vermont, which they say implies personal privileges and duties incident only to individuals, and inapplicable to aggregate corporations. The case of *The Union Turnpike Road v. Jenkins*, 2 Mass. 37, was under the statute of Massachusetts. The question was whether the property attached in the hands of the New England Marine Insurance Company, could be held to respond to the plaintiff's judgment, or in other words, whether a corporation aggregate could be summoned as trustee, (or garnishee,) under the statute. The court held, that as the garnishee's liability was to be ascertained in all cases by his examination upon oath, one who is incapable of disclosing in such manner, cannot be held as trustee. In *Neuer v. O'Fallon*, 18 Mo. 277, it was held, that in a suit against a creditor of a corporation, its treasurer, having its money in his hands, is not liable to garnishment. The corporation had directed its treasurer to pay a specific sum out of its funds, in his hands, to the defendant, in attachment, as a gratuity for the benefit of third parties. In which case it was held, that neither the corporation, nor its treasurer, were liable to the process of garnishment. Locke on Foreign Attachments, 47, says: "Goods and debts, funds and dividends, cannot be attached in the hands of the Bank of England or the East India Company." On the other hand, it has been held in Pennsylvania, in the case of *Cramand v. The Bank of the United States*, 1 Binney, 64, and *Jackson v. Bank of United States*, 10 Penn. 61, that the bank was liable to the process of garnishment, and that the funds in its hands might be subjected to the payment of the plaintiff's claim.

We have endeavored to give all the authorities that have come under our observation, in which it has been held that corporations of any kind are not liable to be summoned as garnishees. The reasons given for the exemption claimed, are as numerous and various as the cases themselves, and no two of them agree in assigning the same reason. The distinction claimed to exist between private corporations and municipal corporations in respect to their liability as garnishees, as held in *Hawthorn v. St. Louis*, does not seem to

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us to be founded in reason. The argument to show why one should be exempt, applies with equal force to the other. That public municipal corporations should not be compelled to stand at the bar, and participate in controversies between debtor and creditor, is a view of the subject that we confess has not struck us very forcibly. In the cases cited from 2 Mass. 37, and 6 Vermont, 121, the reasons assigned for the exemption, that a civil political corporation cannot appear in court, and can neither answer under oath nor testify by proxy or agent, do not apply to those courts, nor in those states, in which the corporation may appear by attorney, or in which its answer may be taken and verified in the same manner as an answer in chancery. Much confusion of ideas may be avoided by bearing in mind that the corporation, as garnishee, is summoned to answer as a party, and not to testify as a witness. In Massachusetts and Vermont, the position of the garnishee has been likened to that of a witness, and it was held, that as an aggregate corporation was incapable of disclosing on oath, property in its possession could not be garnished. Cushing's Trustee Process, § 111, § 112. Nor do we think that any difficulty connected with the question, is solved by holding that the right of a corporation to exemption from the process of garnishment, rests on the same principle as that of persons who are adjudged exempt as holding the property of the defendants in legal capacities. Drake on Attachment, 361, § 497. The force of the reasoning when applied to judicial and executive officers, or persons holding a fiduciary relation to the defendant, we can readily understand and appreciate. But we see no good or sufficient reason why a municipal corporation, that can contract a debt for the construction of a public landing for steamboats, should not be held liable to be summoned as garnishee, nor why such an indebtedness should not be held to respond to the plaintiff's judgment against the defendant. It did not arise out of any fiduciary relation between the city and Bennett, nor was it assumed by the city in any judicial or executive capacity. We are to presume that the city contracted for the work at the steamboat

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landing, as any private person might have contracted, and its liability to pay for it, is in no sense different from the ordinary indebtedness of an individual. Except where the exemption is specially provided for by statute, or may be adjudged to depend upon the very reason and nature of things, it is safe to hold that a garnishment will lie to subject those demands for which the defendant in attachment may maintain *indebitatus assumpsit*. *Cook v. Wallhall*, 20 Ala. 384. The force and authority of the different decisions on the right to summon a municipal corporation as garnishee, have been very much weakened by their want of uniformity. This want of uniformity is the result of the great dissimilarity of the statutory enactments under which they have been made. The courts must follow the rule laid down by the law-making power.

When we refer to our own statute in relation to attachments and garnishment, (Code, § 1846,) we think we find sufficient authority for holding that a corporation is liable, as any other debtor, to the process. The plaintiff may cause any property of the defendant, which is not exempt from execution, to be attached at the commencement or during the progress of the proceedings. "The attachment by garnishment is effected by informing the supposed debtor or person holding the property, that he is attached as garnishee, &c." §§ 1861-1863. Though corporations are not expressly named as liable to the process, they may fairly be adjudged to be included, both by the reason of the law and by those rules of construction in such cases deemed legitimate, and in our state expressly provided by statute. The Code in relation to the construction of statutes, enacts (§ 6), "The word 'person' may be extended to bodies politic and corporate." When the word "person" is used in a statute, corporations as well as individuals are included. *Bushel v. Commonwealth Ins. Co.*, 13 S. & R. 173. So in *S. C. Railroad Company v. McDonald*, 5 Georgia, 531, it is held, that "corporations are embraced within the provisions of the act, (giving a remedy at law by attachment against a foreign corporation), because the terms used in the act which describe the

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persons made subject to its operation, are descriptive of corporations. Those words are "person," "party," "defendant," "debtor." Either of these words describes a corporation. It is a person under the law—an artificial person created by the legislature. Where the law-making power uses the word "person," it is to be presumed that the legal meaning is intended, and not the social or ordinary meaning. The word is descriptive of all who are in professional parlance, "persons." There is one rule of statutory construction recognized in England, and in the Supreme Court of the United States, which is conclusive of this question. Corporations are to be considered as persons, when the circumstances in which they are placed, are identical with those of natural persons, expressly included in a statute. *S. C. Railroad Co. v. McDonald*, 5 Georgia, 531.

It cannot be denied that in many of the recent decisions, a disposition has been manifested by the courts to modify the strict doctrines formerly held with regard to corporations. With the multiplication of them which has been and is taking place to an almost indefinite extent, there has been a corresponding change in the law in relation to them. There was a time when it was supposed that no suit could be sustained against them, unless upon an express contract, under the seal of the corporation. 15 S. & R. 173. It is now held that they are liable in trespass, and in case, on an implied contract. Whether a corporation can be the subject of an action for libel, slander or malicious prosecution, is a point which has been discussed only of late times. In *Childs v. The Bank of Missouri*, 17 Missouri, 214, it was held, that the bank was not liable in an action "for falsely accusing plaintiff of embezzlement, and for unjustly, maliciously, and without probable cause, causing him to be arrested and imprisoned." The same question arose in England in 1854, but was not decided, in the case of *Stevens v. Midland Counties Railway*, 10 Excheq. 355. In *Goodspeed v. The E. H. Bank*, 22 Conn. 538, the same question arose, and it was, after full argument, though by a divided court, held that the action would lie. "The views of the old law-

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yera," (said CHURCH, C. J.) "regarding the real nature, power and responsibility of corporations, to a great extent, are exploded in modern times, and it is believed that now these bodies are brought to the same civil liabilities as natural powers." In *The Trenton Mutual Life and Fire Insurance Co. v. Perrine*, 8 Zabriskie, 412, it was adjudged, in the Supreme Court of New Jersey, that a corporation aggregate may maintain an action for libel, for words published of them concerning their trade or business, by which they have suffered special damage.

While we will not be understood as expressing any opinion upon the questions arising in the cases cited above, we have referred to them in order to express our concurrence in the views of the court, that the tendency of modern adjudication has been, so far as practicable, to treat corporations as natural persons, and to hold them liable as individuals, civilly and criminally, for torts committed by their agents and servants, and for all injuries inflicted by their wrongful acts. As we have been unable to perceive any good reason, why a municipal corporation should not be held liable to the process of garnishment, we are of opinion that the judgment of the District Court must be reversed.

Judgment reversed.

WILSON v. WILSON.

Where in an action on a promissory note, for the sum of \$10,000, dated in November, 1848, one-half payable in one year, and the other half in two years, from the date thereof, which action was brought, to recover the last payment, it appeared that the defendant, to secure the payment of said note, executed a mortgage on several parcels of real estate, situate in the state of New Hampshire; that the defendant having failed to pay the amount first due on said note and mortgage, the plaintiff, in March, 1850, commenced proceedings under the laws of New Hampshire, to foreclose the defendant's equity of redemption in said lands; that in September, 1850, a decree was rendered, that plaintiff should be put into possession of the lands mortgaged, and a conditional judgment against the defendant, for the amount of the first

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payment and interest; under which the plaintiff received possession of a portion of the lands, on the 15th day of March, 1851, the defendant having the right to redeem within one year; and that at the time of the execution of said mortgage, said lands were incumbered to a large amount, by mortgages to other persons; which the plaintiff was compelled to pay; and where the court instructed the jury, that the suit did not open up the foreclosure, and that in making up their verdict, they should ascertain the amount due upon the mortgage, on the 15th of March, 1852,—then ascertain the amount of the incumbrances—add these two amounts together—and from this deduct the value on that day, of the two tracts of land, of which the plaintiff received possession, and credit the mortgage with the remainder—and that the balance due, after such credit, with interest from that date, would be the amount of their verdict; *Held*, That there was no error in the instruction.

And where in such a case, the court instructed the jury, that the premises included in the mortgage, which were not entered upon by plaintiff, were thrown back upon the defendant, and the plaintiff was not to be held for their value; *Held*, That the instruction was correct.

And where in such a case, the court instructed the jury, that the defendant should not be allowed anything for the rents and profits of the premises; *Held*, That the instruction was proper.

Where a mortgage is foreclosed, for an installment then due; and a subsequent suit is brought to recover a second installment, such second suit does not open the foreclosure; nor is the amount found to be due and owing in such case, open to investigation in the second suit.

Where a party under a foreclosure, takes possession of the mortgaged premises, instead of selling them, he should only be held for the value of the premises entered upon; and the defendant is entitled to a credit on the mortgage, *pro tanto*.

Appeal from the Dubuque District Court.

In November, 1848, the defendant made to plaintiff his promissory note for the sum of ten thousand dollars, one-half to be paid in one year, and one-half in two years from date. He also executed a mortgage on several parcels of real estate, situate in the county of Cheshire, state of New Hampshire, to secure the payment of said sums of money. Defendant having failed to make payment of the amount first due, as by said note and mortgage required, the plaintiff, in March, 1850, commenced proceedings under the laws of New Hampshire, to foreclose the equity of redemption of said defendant in and to said mortgaged premises. Such proceedings were had thereon, that afterwards, in Septem-

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ber, 1850, a decree was rendered that plaintiff should be put into possession of the lands so mortgaged, and a conditional judgment against said defendant, for the amount of the first payment and interest. Under this decree, and by virtue of a writ issued to the proper officer, plaintiff afterwards received possession of a portion of said lands. At the time of the execution of said mortgage to plaintiff, said lands were incumbered to a large amount, by mortgages to other persons. The last installment of the mortgage note being unpaid, plaintiff brings this suit, claiming the whole amount of said five thousand dollars, with interest. The defendant answers, setting up the proceedings to foreclose the mortgage, averring that plaintiff had, under the decree, been put into possession of the premises so mortgaged, and that their value was at that time, and still is, greatly above the amount due and owing plaintiff by said note. A large amount of testimony was taken, all of which is before the court by bill of exceptions. Judgment for plaintiff for sum \$2,000 less than the amount due by the last installment; and defendant appeals, assigning for error the instructions given by the court to the jury, which will be found sufficiently stated in the opinion of the court.

Smith, McKinlay & Poor, for the appellant, cited the following authorities: *West v. Chamberlain*, 8 Pick. 338; *Amory v. Fairbanks*, 3 Mass. 562; 1 Hilliard on Real Prop. 456; *Deming v. Cummings*, 11 New Hamp. 474; *Hunt v. Stiles*, 10 Ib. 486; *Batchellor v. Robinson*, 6 Ib. 12; *Newhall v. Wright*, 3 Mass. 149; *Erver v. Hobbs and wife*, 5 Metc. 5; 4 Kent Com. (8th ed.) 183; *Lovell v. Leland*, 3 Vermt. 581.

Geo. L. Nightengale and Clark & Bissell, for the appellee, cited the following: 2 Hilliard on Mort. 38; 5 Metc. 5; *Hatch v. White*, 2 Gallison, 152; 9 Cow. 346; 1 Cruise on Real Prop. 222; 3 Johns. 330; 3 Powell on Mort. 1002, note 1; 2 Brown Ch. 125; *Thompson v. Blanchard*, 2 Iowa, 44; 4 Kent Com. (8th ed.) 173; *Latterett v. Cook*, 1 Iowa, 8.

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WRIGHT, C. J.—The errors assigned in this case question the correctness of certain instructions given and refused by the court below. It appears that under the proceedings to foreclose the mortgage, the plaintiff entered into possession of a portion of the premises on the 15th day of March, 1851, and that defendant had a right, at any time within one year from that date, to redeem the same. The court instructed the jury, that this suit did not open the foreclosure; and that in making up their verdict, they should ascertain the amount due upon the mortgage on the 15th of March, 1852; then ascertain the amount of the incumbrances; add these two amounts together, and from this deduct the value on that day of the two tracts of land of which the plaintiff received possession, and credit the mortgage with the remainder; and that the balance due after such credit, would be their verdict. The defendant insists that this instruction is erroneous. We are unable, however, to see why he should object to it. Instead of foreclosing, as we do under our laws, by a sale of the mortgaged premises, it seems that plaintiff claimed the possession because the condition attached to the deed had been broken, by the non-payment of the first installment of money secured thereby. The decree of the court found that said condition had been broken, and that plaintiff was entitled to such possession. Under the law, however, defendant had one year within which to redeem. Having failed to redeem, the title of the plaintiff became perfect, just as under our law it would have done by the sale, and failure to redeem the mortgaged premises. The testimony shows, that from March, 1851, (the date of the plaintiff's entry,) until March, 1852, (the expiration of the year for redemption,) the premises increased in value. This instruction gives to defendant the benefit of this increased value, and so far he certainly has no reason to complain. After the expiration of the year for redemption, he had no further right to the land; and he could, therefore, claim no advantage from any subsequent appreciation in value. So far as the instruction lays down the rule, that this suit does not open the foreclosure, there can certainly be no just excep-

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tion. The proceeding to foreclose the mortgage was for the installment then due. The amount sued for in this case, was not due at that time. The amount then found to be due and owing by that adjudication, is not open for investigation in this case. The plaintiff having foreclosed by taking possession, instead of by sale, he should only be held for the value of the premises so entered upon, and *pro tanto*, defendant was entitled to a credit on said mortgage. This was allowed him under this instruction. See *West v. Chamberlain*, 8 Pick. 338; *Marshall v. Bryant*, 12 Mass. 321; *Hunt v. Styles*, 10 N. H. 466; *Ever v. Hobbs and wife*, Metc. 5; 4 Kent, (8th ed.) 183; *Lovell v. Leland*, 3 Vermont, 581.

But it is said that the bringing of this suit opens the foreclosure, and that defendant has the right to redeem the land so entered upon, by paying the full amount of the mortgage debt. To this view there are, to our minds, two conclusive objections. The first is, that this suit is not brought to recover the same sum of money which was claimed by the foreclosure proceedings, but for another and different installment. The case of *Batchelder v. Robinson*, 6 N. H. 12, referred to by appellant, shows that there was payment and acceptance of the money by the mortgagee, after foreclosure, and this was held to waive or open such foreclosure. The distinction between that case and the one before us, is too manifest to need comment. The second objection to the position of the appellant is, that there is nothing to show, nor is there any pretence, that he has paid, or offered to pay, the amount due on the mortgage, or any part thereof.

The court below also instructed the jury that the premises included in the mortgage, which were not entered upon by plaintiff, were thrown back upon defendant. This is assigned for error by appellant. No objection has been pointed out to it, however, and we are unable to see any. Had the premises named in the mortgage been offered for sale under the proceedings to foreclose, the mortgagor would only have been entitled to credit for the amount, for which any one or more parcels might have sold, and not for the

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value of those which did not sell. The plaintiff's entry, in the language of the court below, "was a process to compel payment; and if, instead of taking possession of all the premises, he entered upon a part only, he is not to be held for the value of those parcels upon which he did not enter. And when he sues for a second installment, defendant cannot complain, if the land not entered upon, is thrown back to him; and plaintiff is held to have waived by such suit, the right to enter upon such land." It is next objected, that the court instructed the jury that defendant should not be allowed anything for the rents and profits of the premises. We can see no possible objection to this instruction. Defendant never redeemed the premises. After his failure to redeem, plaintiff's title to the land was indefeasible and perfect, without any right in the defendant to claim for rents and profits during the year intervening between the entry and the expiration of the right to redeem.

In the last place, it is insisted, that the court erred in refusing to give certain instructions asked by defendant. Some of these have been sufficiently noticed, in what has already been said, and as to the others, we need only say that they were not pertinent to the case made by the proof, and were, therefore, correctly refused. *Hammett v. Russ*, 4 Shep. 171; *Nealy v. Brown*, 1 Gilm. 15; *Whitaker v. Pullen*, 3 Humph. 466; *Miller v. Gorman*, 5 Blackf. 112.

Judgment affirmed.

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If a conveyance of real estate be so uncertain in its description, that it cannot be known what estate was intended, the conveyance will be void.

If the description in the instrument includes several particulars, all of which are necessary to ascertain the estate to be conveyed, none will pass, except such as corresponds with every particular of the description.

But if there are certain particulars, once sufficiently ascertained, which desig-

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nate the thing intended to be granted; the addition of a circumstance, false or mistaken, will not frustrate the grant.

The language used in the instrument or conveyance, must be reasonably construed; and the identity of the land ascertained from the entire description. If there shall be in the instrument, a repugnant call, which by the other descriptive terms, clearly appears to have been made through mistake, the conveyance is not void, by reason of such repugnant call.

When the instrument is applied to its subject matter, if it be found that the description in it, is true in part, but not true in every particular, so much of it as is false, is to be rejected; and the conveyance will take effect, if sufficient remains to ascertain its application.

Where in a proceeding in Chancery to recover the undivided half of lot 73 in the city of Dubuque, brought by the residuary legatees of D. S. deceased, it appeared that at the time of S.'s death, the lot was owned and occupied in common by him and respondent; that their title thereto was a pre-emption right, established and recognized by the commissioners appointed for that purpose, under the act of Congress of October 26, 1836, and an act amendatory thereto of July 2, 1837; that the respondent and another, were the executors of said S.'s estate, and in due course of administration, sold all the real property of the testator, including the undivided half of the said lot; that the lot was bought by W. for its fair value, and by him afterwards conveyed to the respondent; that in November, 1854, the respondent obtained a patent for the lot from the United States; that the *inventory* of the testator's property, the notice of sale of said lot, and the return made by the executors of such sale, describe the property as "No. 7—town lot 72, on Main street, in the city of Dubuque,—the undivided half of said lot—the whole being owned by L. M. (the respondent) and D. S.;" that the appraisal describes it, as "No. 7—half of city lot, No. 72;" that the petition for the sale, prayed for an order to sell *all* the real estate of the testator, which embraced various parcels, among which was the "undivided half of lot 72, in the city and town of Dubuque;" that the fact of the application for an order to sell, was entered on the probate records of Dubuque county, in which the property in controversy, was described as "the undivided half of lot 72 in the city of Dubuque;" that an order was made, by the Probate Court, authorizing the executors "*to sell the whole of said real estate in the inventory thereof specified,*" that the deed to W., who purchased at the executor's sale, describes the premises as "the undivided half of lot 73, as designated on the government plat of said city of Dubuque; that the sale took place on the lot, and the bidders all understood that they were bidding on lot 73—the same being situate on the corner of Main and Third streets, while lot 72 is in another block, and was never owned by S. and M.; that in a subsequent report of the condition of the estate, the executors charge themselves with the sum of \$1,112, for "the undivided half of lot 72;" that a final settlement of the estate was made in 1851, at which time the complainants were present, either personally or by attorney, and "*admitted the correctness of the account,*" and were then paid the amount ascertained to be due each by the terms of the will; *Held*, 1. That so much of the description of

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the lot as was false, might be rejected, and the proceedings before the Probate Court, and the sale by the executors, sustained, on the ground that a sufficient description remained to show the application of those proceedings.

Appeal from the Dubuque District Court.

THE complainants, as the residuary legatees of David Sleator, deceased, claim of the respondent, the undivided half of lot 73 in the city of Dubuque. At the time of Sleator's death, this lot was owned and occupied in common by him and respondent, the title thereto being a pre-emption right duly established and recognized by the commissioners appointed for that purpose, under the act of Congress of October 26, 1836, and an act amendatory thereto of July 2, 1837. The respondent and another were executors of said decedent's estate, and in due course of administration sold all the real property, including, as is claimed, the undivided half lot in dispute. The lot was bought by Thomas S. Wilson, for what is shown to be its fair and reasonable value; and by him afterwards sold to respondent, who in November, 1854, obtained a patent from the United States, investing him with the full legal title to all of said premises. The complainants insist that respondent holds said legal title, as to the undivided half of said lot, in trust for them; and on the other hand, respondent claims that their right to said property was entirely divested by the sale made in pursuance of the order of the Probate Court aforesaid. The only question made is, whether the said probate proceedings, so far identify and describe said lot, as to pass the interest of said decedent to the purchaser.

The inventory, notice of sale, and the return made by the executors of such sale, describe the property as "No. 7, town lot 72, on Main street, in the city of Dubuque, the undivided half of said lot, the whole being owned by Lawrence Malony and David Sleator." The appraisement describes it as "No. 7, half of city lot No. 72," and values it at \$1,500. The petition for the sale, prays for an order to sell all the real estate, (which is shown to embrace various parcels,)

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and among others, the "undivided half of lot 72, in the city and town of Dubuque." The fact of said application to sell is entered on the probate record, the material parts of said entry being as follows: "this day personally appeared Lawrence Malony and Herman Chaderich, and presented a petition praying for license to sell all the real estate of their testator," &c.; "the lands described in said petition being as follows," (describing other parcels,) and "the undivided half of lot 72, in the city of Dubuque;" and then follows the usual order for notice by publication. Proof of publication having been made, an order was entered authorizing the executors "to sell the whole of said real estate in the inventory thereof specified." The deed to Wilson describes the premises as "the undivided half of lot No. 73, as designated on the government plat of said city of Dubuque," and his deed to respondent contains the same description. In a subsequent report of the condition of the estate, the executors charge themselves with the sum of \$1,112, for "the undivided half of lot 72." A final settlement was made of said estate in 1851, at which time the complainants were present, either personally or by attorney, and "admitted the correctness of the account," and they were then paid the amount ascertained to be due each by the terms of the will. About this time, it is also shown that the attorney for some of the claimants, examined the lot, talked about it with the judge of probate, and understood lot 73 to be the one that was sold. At the sale, the bidders all understood that they were bidding on lot 73, the same being situated on the southwest corner of Main and Third streets, in said city of Dubuque. Lot 72 is in another block, and was never owned by Malony and Sleator, or either of them, but has always been known and recognized as the property of other and different persons. Lot 73 has, on the contrary, been known for a number of years as belonging to Malony and Sleator. Upon this state of facts, the decree below was in favor of respondent, from which the complainants appeal.

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Hand & Covell, for the appellants.

Smith, McKinlay & Poor, for the appellee.

WOODWARD, J.—The argument of appellants has, for the most part, been based upon the hypothesis, that respondent, to support his title, is required to contradict the records of the Probate Court, connected with the sale of this lot. If his title cannot be otherwise supported, we are clear that it must fail. That record must give its own history, and cannot be explained, varied, or contradicted by parol evidence. If, as it stands, the proceedings are sufficiently regular to pass the title, and to give the respondent the equitable, as well as the legal, right to this lot, the decree below must be affirmed, otherwise not. It will be observed, that the inventory, notice, order of sale, and the return thereof, all describe the property as "town lot 72, on Main street, in the city of Dubuque, the undivided half of said lot, the whole being owned by Lawrence Malony, and David Sleator." We assume that the order of sale so describes it, for it gives authority to sell all the real estate in the inventory specified, and thus adopts the description therein contained. The petition asks for license to sell all the real estate, and when it comes to the description, speaks of "the undivided half of lot 72, in the city of Dubuque;" and this description is substantively followed in the appraisement and other entries, except that the appraisement designates it as parcel No. 7, the same number as in the inventory.

The question presented is, whether these proceedings may be sustained by the rule, that a false or mistaken description shall not vitiate. *Falsa demonstratio non nocet*. It is manifest, that when we come to apply this record to the subject matter, the description used is true in part, but not true in every particular. Malony and Sleator never owned lot 72, but they did 73. Are we justified, then, in rejecting the number 72, as being false, and upholding the proceedings, upon the ground that a sufficient description will still remain to ascertain their application? Or, to change the

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phraseology of the proposition, shall the respondent be deprived of this property, because the lot, otherwise accurately and correctly described, has been misnamed and called lot 72, instead of lot 73? This is the state of the case as presented to us, upon strictly legal grounds; and it is very probable, that the defendant's claim might be sustained, upon even this merely legal view of the matter, by rejecting that part of the description which is *falsa demonstratio*.

A brief reference to a few general rules and well-considered cases, will, we think, show how the argument would stand under that view. If a conveyance be so uncertain in its description, that it cannot be known what estate was intended, the conveyance will be void. If the description includes several particulars, all of which are necessary to ascertain the estate to be conveyed, none will pass, except such as corresponds with every particular of the description. But, if "there are certain particulars, once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant." There must be a reasonable construction of the language used, and the identity of the land, ascertained from the entire description. If there shall, in the instrument, be a repugnant call, which by the other descriptive terms, clearly appears to have been made through mistake, the conveyance is not void by reason of such repugnant call. And, finally, when the instrument is applied to its subject matter, if it be found that the description in it, is true in part, but not true in every particular, so much of it as is false, is to be rejected, and it will take effect, if sufficient remains to ascertain its application. These general rules are fully recognized by the following, as well as other, authorities: 1 Greenleaf Ev. § 301; *Worthington v. Hylier*, 4 Vir. 205; *Jackson v. Clark*, 7 Johns. 218; *Jackson v. Williams*, 17 Johns. 156; *Jackson v. Marsh*, 6 Cow. 284; *Lash v. Deuse*, 4 Wend. 319; *Loomis v. Jackson*, 19 Johns. 449; *Cleveland v. Smith*, 2 Story, 291; *Boardman v. Reed et al.*, 6 Pet. 328; *Jackson v. Sprague*, 1 Paine, 494; *Vass v.*

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Handy, 2 Greenl. 322; 4 Cruise Dig. tit. 32, ch. 21, § 81, and note.

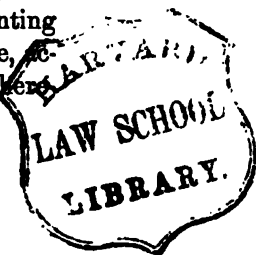
But there is a higher, broader, and more satisfactory ground, upon which the cause truly stands. Let us look away from the papers, and from the verbal description, a moment, and regard the matters of fact, the transactions *in pais*. The true lot was offered for sale, the sale took place upon it, the bidders saw it, they bid upon it at the spot, they knew the lot really intended, and bid upon it accordingly; they bid upon the lot they intended to bid upon and to buy, but the number in the papers was wrong—it was a mistake. Thus, Wilson bid upon the lot intended to be sold, and the one he intended to buy. Add the further fact, that in April, 1851, a settlement was made of the estate, at which time the complainants were present, either personally or by attorney, and admitted the correctness of the account, and they were paid the amount ascertained to be due each, by the terms of the will. Under these facts, the case stands thus in legal proposition: The complainants claim the lot, in equity. Respondent answers, that he holds the legal title from the United States. Complainants reply that this is true, but that he obtained this legal title with a knowledge of their ancestor's, (or devisor's,) equitable interest. He rejoins that this was divested by the executor's sale. They rebut, by showing the mistake in the number; in effect saying, that although it was intended to sell this lot, and although the bidders bid upon it, and although Wilson supposed he had bought this one, yet in the papers it was described by a wrong number. Now, how does a court of equity look upon this? He that comes into equity, must come, not only with clean hands, but with a pure conscience. How do the equities stand between these parties? Not even so equally balanced as their legal positions. In strict law, the complainants have the advantage of a mistake, but the respondent has the legal title from the source of title. And what equity does the complainant show, to take away that legal title? None whatever. When he asks the court to set aside the probate sale, it is upon strictly

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legal ground, and then the respondent may well show his title. There is no equitable principle upon which complainant asks to set aside that sale. The equity is all on the other side; consisting in the intent on the one side to sell, and on the other side to buy, the true lot, and the one which was in reality sold and bought. The mistake does not appear to have misled, or in any manner prejudiced any one. It was hidden in the papers, whilst the outside transaction was correct, true, *bona fide*, and well understood.

It is worthy of note, that the complainants do not offer to restore to respondent, or to his grantor, the money which either of them paid, a part of which has been received by complainants, and the remainder applied to the payment of their devisor's debts. But in the view taken, no weight is given to this fact. We do not think this a cause presenting an equity which can prevail to set aside the legal title, acquired from the government; and the court must, therefore, refuse to interfere in behalf of the complainant.

The decree of the District Court is affirmed.



 SMITH v. SILENCE.

A demurrer is waived, by the defendant answering the petition.

To call a woman a "whore," is actionable of itself, without proof of special damage.

Where a wife is deserted by the husband, and she continues to live apart from him, and is dependent upon herself for a support, she may sue and be sued as a *feme sole*.

Where in an action for slander, it appeared that the plaintiff was a married woman; that about fifteen years before, the husband of plaintiff, left her and went to New Orleans to reside; that he wrote to his wife for two years and a half after he left, about which time, she was induced to believe that he had died in New Orleans, of yellow fever; that she remained in this belief until the autumn of 1854, when the husband wrote to his father, in New York, from Havana, in Cuba, inquiring about his family; that he also wrote to his wife, and requested her to come to Havana, and live with him; that in March, 1855, plaintiff went to Havana, and went to the house of her husband; that from what she saw and heard of him, when she ar-

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rived, she refused to live with him, and returned to the United States, as soon as she was able to leave the island of Cuba; and that the husband had accumulated property in Havana; *Held*, That the desertion and continued abandonment of the wife by her husband, was sufficient authority for her to sue in her own name; and that she had such right to sue, without first obtaining authority from the District Court, under chapter 84 of the Code.

The remedy provided by sections 1456, 1457 and 1458 of the Code, in relation to married women abandoned by their husbands, is cumulative, and is more particularly applicable to cases, where the abandonment is not such as to imply a total renunciation of marital rights, or where there appears to be no intention of leaving the wife free to act as a *feme sole*.

Appeal from the Dubuque District Court.

THIS was an action to recover damages for slanderous words spoken of and concerning the plaintiff by the defendants, in calling her a whore. The petition alleges no special damages to plaintiff from the speaking of the words. There was a demurrer to the petition, which was overruled by the court. The defendants then answered, denying the allegations of petition. It appeared, during the progress of the trial, that plaintiff was a married woman, and that her husband was still living. Defendants moved the court to direct a nonsuit, for that reason; it being admitted, as stated in the record, that plaintiff had not applied to the District Court, and obtained permission to sue alone, as provided for by the Code, § 1456, &c. The motion was overruled. The court charged the jury, that to call a woman a "whore," is actionable of itself, without any allegation of special damage—to all of which defendants excepted. The jury found a verdict for plaintiff for \$125, for which judgment was rendered. Defendants appeal.

Tripp & Pollock and Wiltse & Blatchly, for the appellants.

Smith, McKinlay & Poor, for the appellee.

STOCKTON, J.—The demurrer was waived by defendant's answer to the petition. This is of the less consequence, in

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this case, as the same question is raised on the instruction given by the court to the jury, "that to call a woman a 'whore,' is actionable of itself, without proof of special damage." We think there was no error in this instruction. The question has been settled by the Supreme Court of this state, first, in the case of *Cox et ux. v. Bunker et ux.*, Morris, 269, and that decision has been subsequently confirmed. See *Reynolds v. Daley*, Supreme Court, Iowa (not published); *Abrams v. Foshee and wife*, 8 Iowa, 274. We are aware that the law is otherwise, in some of the states. In New York, the common law rule is retained, and the words are actionable, only "where the charge, if true, would subject the party charged, to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment." 3 Hill, 22. In other states, the rule has been relaxed. In some, by statute, as in North Carolina, South Carolina, Indiana, Illinois, Kentucky, and Alabama. 1 Littell, 644; Iredell, 136; 2 Devereux, 115; 7 Blackford, 58; 2 Gilman, 34; 2 Littell, 153; 3 Dana, 453; 4 Ala. 44. In others, by the progress of the same enlightened sentiment, acting through their courts of highest resort. 8 Pickering, 385; 3 N. H. 194; 2 Conn. 707; Wright's (Ohio) Rep. 40, 121; 3 Serg. & R. 261; 10 Watts, 245.

The only other question raised, is upon the refusal of the court to order a nonsuit, on motion of defendants, upon the ground that the plaintiff was a married woman, and had not obtained authority from the District Court, to sue in her own name. The testimony was, that about fifteen years before, James W. Smith, the husband of plaintiff, left her and went to New Orleans to reside; that he wrote to his wife for two years and a half after he left, about which time she was induced to believe, that he had died in New Orleans, of yellow fever; that she remained in this belief until the autumn of 1854, when he wrote to his father in New York, from Havana, in Cuba, inquiring about his family; that he also wrote to his wife, the plaintiff, and requested her to come to Havana, and live with him; that in March, 1855, plaintiff went to Havana, and went to the house of said

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Smith; that from what she saw and heard of him, when she arrived, she refused to live with him, and returned to the States as soon as she was able to get away from the island; and that Smith had accumulated property at Havana; but it does not appear that he had ever made any provision for the support of his family. Without determining whether the non-joinder of the husband, admitting it to have been a material defect, could be taken advantage of by motion for a nonsuit, instead of by plea in abatement; and without inquiring whether the fact of such non-joinder, however objected to, was sufficient to have dismissed the suit, we proceed to the more important inquiry, whether the desertion and continued abandonment of the plaintiff by her husband, was not sufficient authority for her to sue in her own name?

If the husband be *civilitur mortuus*, or transported for a number of years, or has been abroad seven years, and not heard from, though he voluntarily left the country, the wife may be sued alone upon a contract made by her during that time. *Grasser and ux. v. Eckart and ux.*, 1 Binney, 575; 2 Campbell, 273; *Robinson v. Reynolds*, 1 Aikens, (Vermont), 175; 1 Chitty Pl. 67. In *Gregory v. Paul*, 15 Mass. 31, the authorities on the question are collected and reviewed by PUTNAM, J. Where the husband was exiled, the wife was permitted to sue in her own name (Co. Litt. 132 a), and the same reason applying, where the husband had abjured the realm, the wife was allowed to sue as a widow for her dower. She has in like case been permitted to alien her land without her husband. She is exempted from the disabilities of coverture. She may maintain trespass. *Eliza Wilmot's Case*, Moore, 851. She may sue for her jointure; and she may be sued as a *feme sole*. *Dubois v. Hale*, 2 Vernon, 614. She may make a will, and in all things act as if her husband was dead. *Countess of Portland v. Rogers*, Ib. 104. As the court well observed, the necessity of the case required that she should have such a power. It has been uniformly considered, that banishment or abjuration was a civil death of the husband. And the banishment of the

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husband, even for a limited time, operates as a removal of the disabilities of coverture, so far as to enable the wife to sue and be sued as a *feme sole*, although the time of banishment had expired when the action was brought. *Newsome v. Boyer*, 3 P. Williams, 87.

The facts and circumstances which should be considered as proof of his having abjured the realm, have been liberally regarded. Thus, where the husband resided abroad, leaving his wife to trade and gain credit as a *feme sole*, this has been considered as sufficient to entitle her to obtain credit, and to render her liable to be sued as a *feme sole*. 1 B. & P. 357. In *Gregory v. Paul*, above cited, the plaintiff had been domiciled in Massachusetts many years as a *feme sole*. Her husband was an alien. He never was in this country, and was not expected ever to be. He had abandoned his wife, and for a number of years made no provision for her support in his own country. He had not abjured his country, but he had compelled her to abjure it. The court further say: "If the husband had been a native citizen, and had deserted his wife and become a subject of a foreign state, the law would be clear for her on the adjudged cases. Miserable, indeed, would be the situation of these unfortunate women, whose husbands have renounced their society and country, if the disabilities of coverture should be applied to them during the continuance of such desertion." The court held, that the wife was competent to sue and be sued as a *feme sole*, and that her release would be a valid discharge for any judgment she might recover. The principle decided in *Gregory v. Paul*, was subsequently re-affirmed by the Supreme Court of Massachusetts, in the case of *Abbott v. Bayley*, 6 Pick. 89. The husband had driven the wife from her home by his cruelty and ill-usage; and for twenty years she had acted as a *feme sole*, and been treated as such by those with whom she had dealings. The husband, so far from supporting her, had been living in cohabitation with another woman. She had been obliged to live apart from him, and get her living by trading, her husband residing in another state. It was held, that she was entitled to sue as a *feme*

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sole. In *Gregory v. Pierce*, 4 Metcalf, 478, the same court say: "The principle is now to be considered as settled in the state, that where the husband was never within the commonwealth, or has gone beyond its jurisdiction; has wholly renounced his marital rights and duties, and deserted his wife; she may make and take contracts, and sue and be sued as a *feme sole* in her own name. It is an application of an old rule of the common law, which took away the disability of coverture, when the husband was exiled or had abjured the realm."

To accomplish this change in the civil relations of the wife, the desertion of the husband must be absolute and complete. It must be a voluntary separation from, and abandonment of the wife, embracing both the fact and intent of the husband, to renounce *de facto*, and as far as he can do it, the marital relations, and leave his wife to act as a *feme sole*. Such is the renunciation, coupled with a continued absence in a foreign state or country, which is held to operate like an abjuration of the realm. *Gregory v. Pierce*, 4 Met. 479. See also *Edwards v. Davis*, 16 John. 286; *Cornwall v. Hoyt*, 7 Cow. 420; *Troughton v. Hill*, 2 Hay, 406; *Wright v. Wright*, 2 Dessaus. 244; *Dean v. Richmond*, 5 Pick. 461; *Lewis v. Lee*, 5 D. & R. 98, and 3 B. & C. 291; *Ex parte Frank*, 7 Bingh, 762; *Williamson v. Dawes*, Ib. 294.

The case of the present plaintiff, it seems to us, presents as cogent reasons for the application of this doctrine, as any of those cited. She had been deserted by her husband for fifteen years. It does not appear that, during all this time, he had furnished her any means of support. And she was left to her own labor, and to the credit she might be able to obtain as a *feme sole*. For more than ten years she does not hear from him; she does not know where he is, and is induced to believe he is dead. When she does hear from him, he is in a foreign country, and writes for her to come to him. Forgetful of the fifteen years of desertion, she seeks his home in a foreign land. She no sooner arrives in Havana, than having reason to believe that he is living in a

state of concubinage with another woman, she determines not to live with him—declares her intention of returning—and takes the first opportunity of doing so. From these facts, we think that the following positions are established: First. That Smith, the husband, had voluntarily separated from, and abandoned his wife; Second. That the desertion by him was absolute and complete, and was continued for so long a time, that he is to be considered as civilly dead; Third. That this renunciation by the husband, coupled with his departure to a foreign state, and his continued residence there, amounting to an abjuration of the realm, shows not only the fact of abandonment, but the intent, so far as he could, to leave the wife free to act as a *feme sole*. Nor do we think that the relation between the parties has been restored by the request of the husband, that the plaintiff should join him at Havana, nor by the wife going to that place, and remaining at his house during her stay in the island. The son testifies that the plaintiff, immediately after her arrival, upon being informed of the course of life of her husband, expressed her determination not to live with him, and to return to the States; and that she did return as soon as she could leave the island. The husband had no right, under the circumstances, to require her to abjure her country, nor to remain with him, if she believed he was living in a state of concubinage with another woman.

The only remaining question is, should the plaintiff have obtained authority from the District Court, as a married woman abandoned by her husband, to act as though unmarried, and to sue in place of her husband? Code, §§ 1456, 1459. We think she had this right, without the additional authority which the decree of the District Court could confer. The remedy afforded by the statute, is cumulative, and is more particularly applicable to cases where the abandonment is not such as to imply a total renunciation of marital rights, or where there appears to be no intention of leaving the wife free to act as a *feme sole*. We must say, in conclusion, that in our opinion, reason, justice and authority, concur in impressing us with the correctness of the rule we

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have sought to lay down. We see no principle upon which it can be considered necessary or proper, that the husband should be a party plaintiff in this suit. The statute, (Code, § 1676,) requires that the suit shall be prosecuted in the name of the real party in interest. What interest, we may inquire, has the husband, in the event of this suit? For fifteen years, he has renounced the society of his wife, and lived apart from her; he has abjured his country, and during all the time, though able to do so, has made no provision for the support or maintenance of his wife and children. It would be wholly irreconcilable with our notions of law and justice, that he should now be entitled to her earnings, or the little property she may have accumulated by her labor. And such has been the indifference he has so long manifested for her happiness or welfare, that it is more than idle to claim, that he is the injured party, by a tort upon her person, property or character, or entitled to the damages received in an action brought for a redress of her wrongs.

Judgment affirmed.

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Where a deed conveyed certain real estate by the following description: "Section thirty-six (36), section thirty-five (35) east half, and southwest quarter and east half of northwest quarter of section nine (9), township seventy-seven, range eighteen west; and where it was claimed, that the deed conveyed the *whole* of section thirty-five, and the east half, and southwest quarter, and east half of northwest quarter of section nine; *Held*, That the deed conveyed only the east half of section thirty-five, and the southwest quarter, and east half of northwest quarter of section nine.

Appeal from the Marion District Court.

IN Chancery. In September, 1848, the complainant conveyed to the respondent Rosiers, certain real estate in Marion county. On the 29th day of May, 1849, he, by

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deed of general warranty, conveyed certain lands in the same county, to the respondent Zeelt.

In November, 1855, the said Zeelt commenced an action against complainant, on the covenants of warranty contained in her said deed, alleging that the title to one half section of the land therein described had failed, and that complainant had previously conveyed the same to said Rosiers, by said deed of September, 1848. Thereupon complainant filed this bill, making said Zeelt and Rosiers parties defendants, setting forth that the said half section of land never was intended to be conveyed to Rosiers; and that the said deed to Rosiers, in the description of the land, may be uncertain and ambiguous in its meaning, and if held to embrace said half section, then it so describes it by mistake, which is well known to said Rosiers; for that in truth and in fact, it was well known and understood by the said Rosiers, as well as complainant, at the time of said conveyance, that the said land was not designed to be conveyed by such deed. An injunction was prayed for, and relief general and special. The injunction was granted, and the bill answered by both respondents. Rosiers denies the alleged mistake, and insists that by his deed, complainant did convey the said land to him. The cause was heard upon bill, answer, replication, exhibits, and depositions, the injunction made perpetual, and Rosiers decreed to release all claim to said land. From said decree, Rosiers appeals. The other material facts, appear in the opinion of the court.

W. H. & J. A. Seevers and *E. W. Eastman*, for the appellant.

1. There is no ambiguity in the deed. A careful inspection of it will make this clear. The plaintiff, however, insists that there is. For the purpose of solving any doubts that may exist upon this point, we refer to a few general rules which we regard as well settled.

2. All deeds are to be construed favorable to, and as near the apparent intention of the parties as possible. This apparent intention is to be arrived at from the words of the

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deed; no other words are to be added or substituted. 2 Cruise, 295, top, § 2 and note 1; 1 Greenleaf Ev. §§ 277 and 282; 2 Domat, § 3173; *Child v. Ficket*, 4 Maine, 408; *Child v. Wells*, 13 Pick. 121.

3. Where the intention is clear, too minute a stress ought not to be laid on the strict and precise meaning of the words. 2 Cruise, 297, top, § 4, particularly note 1; *Ewing v. Burnet*, 11 Pet. 41.

4. The terms of every written instrument, are to be understood in their plain, ordinary and popular sense, unless they have generally, in respect to the subject matter, as by the known usage of trade, or the like, acquired a peculiar sense, distinct from the popular sense of the same words. 1 Greenl. Ev. § 278; *Choate v. Burnham*, 7 Pick. 274; 1 Greenl. Ev. §§ 299 and 301, note 1; *Robertson v. French*, 4 East; 2 Domat, § 3173, and instance there given; *Comstock v. Van Dusen*, 5 Pick. 166.

5. The construction ought to be on the entire deed, and not merely on any particular part of it. Therefore, every part of a deed, ought, if possible, to take effect, and every word operate. 2 Cruise, 299, top, § 6; *Jackson v. Blodgett*, 16 Johns. 172; *Child v. Ficket*, 4 Maine, 408; *City of Alton v. Ill. Trans. Co.*, 12 Ill. 58.

6. A deed is always construed most strongly against the grantor. Where a deed may enure in different ways, the person to whom it is made, shall have his election which way to take it. 2 Cruise, 302, top, § 13; Same, 313, top, § 49; *Cutler v. Tufts*, 3 Pick. 272; *Salisbury v. Andrew*, 19 Pick. 250; *Doe v. Nixon*, 9 East, 15; *Buchanan's Lessee v. Stewart*, 3 Har. & John. 829; *Jackson v. Blodgett*, 16 Johns. 172; *City of Alton v. Ill. Trans. Co.*, 12 Ill. 58.

7. At the present day, a legal instrument shall not be construed by the acts or declarations of the parties. 2 Cruise, 306, § 23; *Revere v. Leonard*, 1 Mass. 92; *Ingulden v. May*, 7 East, 237; *Allen v. Kingsbury*, 16 Pick. 235; *Parsons v. Miller*, 15 Wend. 561; *Clark v. Wethey*, 19 Ib. 320; *Adams v. Rockwell*, 16 Ib. 285; *Van Wyck v. Wright*, 18 Ib. 158; *Bayham v. Gray*, 3 Vesey, 292; *Eaton v. Lyon*,

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Ib. 690; *Moore v. Foley*, 6 Ib. 232; *Jackson v. Sherman*, 6 Johns. 21; *Salisbury v. Andrew*, 19 Pick. 250; *Comstock v. Van Dusen*, 5 Ib. 166; *Mosely v. Mosely*, 5 Vesey, 258; 4 Phillipps' Ev. note, 286; *Jackson v. Carey*, 16 Johns. 302; *Jackson v. McVey*, 15 Ib. 236.

8. The petition does not charge that there was a parol agreement adopting a certain line, or a practical location and acquiescence therein. But if it did so charge, the evidence would not sustain it. *Parsons v. Miller*, 15 Wend. 561; *Clark v. Wethey*, 19 Ib. 320; *Adams v. Rockwell*, 16 Ib. 285.

9. There is no distinction between law and equity, as to the rules to be observed in the construction of written instruments, or allowing parol evidence, acts or declarations of the parties, to vary or control such construction, except in cases of fraud, accident or mistake. 2 Story Eq. Jur. § 1531.

10. The mistake averred in the petition, is indefinite. How it occurred—whose fault it was—is not shown; nor are there any facts shown. We claim that the petition is not sufficient—it should have set forth the facts upon which the mistake is founded, so that we could take issue thereon. We regard it as well settled, that a defective bill in Chancery will be dismissed at the hearing. But, passing this point, with a brief notice, we say that the mistake as averred and proved, is a mistake of law and not of fact—therefore, will not be corrected. *Pierson v. Armstrong*, 1 Iowa, 288; 1 Story's Equity Jur. § 111; *Thomas v. McCormack*, 9 Dana, 109; *Thompson v. Patton*, 5 Litt. 74; *Hunt v. Rousmanier*, 1 Pet. 1; *Wheaton v. Wheaton*, 9 Cow. 96; *Osborn v. Phelps*, 19 Ib. 70; *Elder v. Elder*, 10 Maine, (1 Fairfield,) 80; *Storrs v. Baker*, 6 John. Ch. 167; *Shotwell v. Murray*, 1 John Ch. 512; *Lyon v. Richmond*, 2 Ib. 51; *Dwight v. Pomerooy*, 17 Mass. 302; *Doyel et al. v. Leas et al.*, 4 Scam. 255, 256; *Garwood v. Eldridge*, 1 Green, (N. J.) 150.

11. A mistake of fact in a deed, will not be corrected by a court of equity, as of course. The proof of mistake must be clear and conclusive. The testimony must clearly show

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what the mistake is, and how it occurred. It must be a mutual mistake, and must not have been caused by the negligence of the party asking that the mistake be corrected. *W. R. R. v. Babcock*, 6 Met. 346; *Marks v. Pell*, 1 Johns. Ch. 593; *Lyman & Lyman v. U. S. Ins. Co.*, 2 Ib. 630; 17 Johns. 373; 1 Story Eq. Jur. §§ 152, 160; *Souwerbye v. Arden*, 1 John. Ch. 240; *Townsend v. Stangroom*, 6 Vesey, 333, 334; *Doran v. Ross*, 1 Ib. 58.

Knapp & Caldwell, for the appellee. Their brief cited no authorities.

WRIGHT, C. J.—Several questions, very important and intricate in their character, have been discussed by counsel; but, as presented, they involve substantially one principal inquiry, and that is, whether the two deeds do or do not convey the same parcels of real estate? The ambiguity, if any, in the conveyance to Rosiers, (or appellant, as we shall hereafter style him,) exists on the face of the deed; and we shall, therefore, solve the difficulty, by giving a judicial construction to the language used in the instrument itself, discarding entirely all the extrinsic evidence of what the parties intended.

The land conveyed to appellant, as shown by the original deed, made an exhibit in the case, is described precisely as follows: "Section thirty-six (36), section thirty-five (35) east half, and southwest quarter and east half of northwest quarter of section nine (9), township seventy-seven, range eighteen west." The deed to Zeelt conveys several tracts, among others, the following: "The northeast quarter of section 9, and the northwest quarter of section 35, township 77, range 18 west." Appellant claims that by his deed, he obtained title to *all* of section thirty-five, and to 560 acres in section nine; or in other words, that the *east half*, following the figures (35), is not to be taken from said section thirty-five, but from section nine; and that, therefore, by this deed, there was conveyed to him the two entire sections (36 and 35), and the third (9), less eighty acres. And fol-

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lowing this construction, the respondent Zeelt claims, that the land above stated, as contained in her deed, was previously conveyed to the appellant. The complainant, on the other hand, insists that by his deed, he conveyed to appellant all of section 36, the *east half of thirty-five*, and a quarter and an eighty in section nine. So it will be seen, that if appellant's construction is the true one, he has title to one section of land more than he would have, according to the construction contended for by complainant.

We think complainant's construction the only one that can be fairly or reasonably given to this instrument; and in giving our reasons for this conclusion, we premise, that it is one of those questions frequently met with, which, though plain from its simple statements, is for that reason, difficult to elucidate or make clearer, after the most elaborate discussion. We believe that the language used, if presented to any number of persons, would invariably receive the construction given to it by the court below. And yet, if asked why they give it such construction, their reasons would perhaps be no more satisfactory to the minds of others, than are the words themselves, as used in the deed. The uniform answer most probably would be, that such was the intention of the parties. Now, we know that it is a maxim of the highest antiquity, and universally recognized, that all deeds shall be construed as near the apparent intention of the parties as possible, consistent with the rules of law. See Broome's Maxims, 238; 4 Greenl. Cruise, 295. And yet the difficulty remains, to explain in the case before us, why the construction placed upon the language used, is the most consistent with the intention of the parties. We will, perhaps, make ourselves as well understood, by stating some considerations which lead us to conclude that the opposite construction, or that claimed by the appellant, is not the correct one. If all of section thirty-five was intended to be conveyed, then why was not the comma, or punctuation point, placed immediately after the figures 35, as was done after the figures 36? If the east half of section nine was conveyed, why the punctuation point after the words *east*

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half? Why, if the additional section was in fact conveyed, as claimed, was the conveyancer so particular in placing points, denoting stops, at the close of the land described, as contained in *each section*? He describes the whole of section thirty-six, and then follows a point or punctuation; then section thirty-five, but no similar or other point, denoting a stop, until the words *east half* are added. Then follows, without further punctuation, a description of two parcels in section nine, and immediately thereafter, another comma. In being thus particular, he seems to have studied to keep the lands in the different sections, separate and distinct. But we inquire again, if the east half of section nine was conveyed, why the use of the conjunction, *and*, between the words *east half*, and *southwest*?

We are aware that the copulative *and*, is used to connect or conjoin two or more subjects, and means to add, or in addition to. And this view of it, would seem to sustain the position, that the southwest quarter, and east half of the northwest quarter, of section 9, were to be added to the east half of the same section. But it performs its office equally well, by saying that these parts of section 9, were designed to be added to the east half of section 35, and the whole of section 36, first named in the description; and especially does this latter thought have force, when we consider, that if appellant is correct, the usual manner of writing the description, would have been to omit the uniting word or copulative, until the last parcel of the section was to be described. The draughtsman in this instance, however, describes all of section 36, then section thirty-five (35) east half, and then, as if entirely through with those sections, he commences the description of the land contained in the only remaining section. Or, to make the argument derived from the use of the conjunction following the words *east half*, more clearly understood, we assume that the usual method of describing three or more parcels of land in the same section, is to employ the uniting term or word, immediately preceding the last parcel, and not to connect the second, or any other than the last description; and especially is this true, when the

comma, or other punctuation point, is used after the description of the first, or any other than next to the last parcel. Thus, in the case before us, if the east half of section nine was to be conveyed, the usual method, or at least, one frequently adopted, would have been to write it thus: section thirty-six (36), section thirty-five (35), the east half, southwest quarter *and* east half of northwest quarter section 9. And while it is true, that this form or description is not so clear as it might be made, yet it will serve to illustrate the position, that the use of the copulative before the word *northwest*, tends to show that the draughtsman, and the parties, designed to there commence the description of the lands in section nine; and that, if it was intended to include the east half of the same section, no adding word would have been employed, until after the description of the second piece.

We do not say that violence is done to any rule of syntax, by the use of the word *and*, in the place named, if appellant's construction is correct; but only mean, that if such had been the intention of the parties, they would most likely have omitted the word, and thus followed the course usually adopted in making or setting out the description of different parcels of real estate.

In deriving aid in the construction of this instrument, from the manner of its punctuation, we have not overlooked the rule referred to by appellant, as found in *Ewing v. Burnett*, 11 Peters, 41; and which is, that punctuation is a most fallible standard by which to interpret writing; that it may be resorted to when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning; and that if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it. This rule, we think, is not violated by resorting to the punctuation, as we have done in this instance. Was it apparent to our minds from this deed, that the additional section was in fact intended to be conveyed, as claimed by appellant, we should certainly not allow the manner of its punctuation, to change such meaning or inten-

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tion. But we do not understand that this standard, while fallible, is to be entirely disregarded. The object of these points, or punctuation marks, in either a law, or written instrument, is to denote the stops that ought to be made in reading, and also to point out *the sense*; and though they may be entirely omitted, courts in construing the law or writing, will read with such stops or pauses, as to give them meaning and effect, rather than in such a manner as to make them nugatory or unreasonable. Bouvier's Dict. Point, Punctuation, citing 4 T. R. 65. In this instance, we have done no more than to resort to such stops or points, made by the parties themselves, to assist in ascertaining the true sense or meaning of the instrument. And, in this connection, we make the further remark, that it may well be doubted, whether this rule should be applied with all its strictness, when construing a description of lands under our system of surveys. It has pertinency, and, in our opinion, was designed to apply more particularly to other parts of an instrument or writing; those parts that state the terms of the contract; the language of a court in giving instructions to a jury, as in the case cited from 11 Peters; the reading of a law or statute; or something of a similar character. But in our state, where lands are surveyed and designated by well understood and specific numbers, and so mapped and divided into sections, half sections, quarter, half quarter, and quarter quarter sections, as to enable us to determine what parcels are meant, by the use of a few words or figures, there would seem to be a propriety in paying attention to the manner in which parties divide or separate several parcels, conveyed in the same deed, by the use of the usual grammatical points or marks. Not that the use of such points shall, by any means, be suffered to change what shall otherwise appear to be the meaning of this part of the instrument, but that, when used, they may be resorted to in aiding other means of construction, and not disregarded, until all others are exhausted or fail. Applying the rule as thus modified, and we think, properly, to the case before us,

and the correctness of the construction given is, we think, most apparent.

But appellant insists, that if it was designed to deed only the east half of section thirty-five, the parties would have stated the description thus: *east half of section thirty-five*, or preceded the section with the part to be conveyed. This would certainly have been more in accordance with the correct and appropriate use of language, and the practice in conveyancing; and, indeed, the fact that the words *east half* follow, instead of precede the number of the section, is to our minds the only reasonable ground upon which to base an argument in favor of the construction claimed by appellant. But to this it may be answered, that the entire description is to be taken together, and to be construed as a whole, and not in parts. And when thus viewed, we think the consideration heretofore presented in favor of complainant's construction, more than outweighs this apparently strong objection. But, as a further answer to this position, it must be remembered, in the language of the Lord Chief Justice, in *Parkhurst v. Smith*, Willis, 332, "that the construction of deeds, ought to be as near to the apparent intention of the parties as possibly may be, and as the law will permit; that too much regard is not to be had to the natural and proper signification of words and sentences, to prevent the simple intention of the parties from taking effect; for that the law is not nice in grants, and therefore it doth often transpose words contrary to their order, to bring them to the intent of the parties. For neither false Latin, nor false English, shall make a deed void, if the intent of the parties doth plainly appear." In this case, we think the words are, and will be, brought "to the intent of the parties," by so transposing them, as to make them precede the number of the section.

Another consideration that has weight with us, in meeting this objection, is this: in ascertaining the intent of the parties, the court will always consider the then particular situation—the circumstances attending the transaction—the state of the country—and the thing granted, at the time of

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the grant. 1 Greenl. Ev. §§ 278, 286, 295; note to 4 Greenl. Cruise, 242. And we deem it proper that, in considering their particular situation, we should have regard also, to any want of knowledge on their part, with the frame and structure of our language. In the case before us, it is evident from an inspection of the instrument, that it was drawn by the parties to it—probably by the complainant. Indeed, we understand it to be admitted and claimed by appellant, that it was drawn by complainant. Both of them are natives of Holland. With this fact before us, and the further one, that it is extremely difficult for persons of foreign birth, and unaccustomed to our language, to speak or write it properly, or with an approach to critical accuracy, we have a key to what might otherwise, under the construction given, seem an improper and unusual description.

Other positions have been urged by counsel, but as suggested in the commencement of this opinion, they are all subordinate to, or dependent upon, the construction to be given the language used in this deed. The conclusion from the instrument itself, that no part of the land conveyed to the respondent Zeelt, is included in the deed to her co-defendant, Rosiers, renders a reference to such other positions unnecessary.

Decree affirmed.

GARRETSON v. THE STATE.

In criminal cases commenced before a justice of the peace, and appealed to the District Court, the affidavit for the appeal must be taken as the basis of the case in the District Court.

If the facts alleged in the affidavit are not correctly stated, the prosecutor should cause the justice to certify the true state of the transaction.

Where in a criminal case commenced before a justice of the peace, in which the defendant was charged with keeping intoxicating liquors, with intent to sell the same within the state, the defendant was found guilty and fined; and where the defendant in his affidavit for an appeal, stated: "That there was no evidence showing that he owned or kept any intoxicating liquor what-

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ever; that one Mason, the officer who served the warrant, testified that he found a barrel of whiskey in the back yard of defendant's premises, but he did not know to whom it belonged; and that the justice held, that as the liquor was found on the defendant's premises, it was presumed that he kept it, with intent to sell, and on that evidence, and on that alone, rendered judgment against the defendant; and where the District Court refused the defendant a new trial, and affirmed the judgment of the justice; *Held*, The District Court erred in not granting the defendant a new trial.

Error to the Linn District Court.

COMPLAINT before a justice of the peace against the defendant, for keeping intoxicating liquors, with intent to sell the same within the state. The defendant was found guilty and fined. He appealed to the District Court, and filed an affidavit, under section 3358 of the Code. The record of the District Court recites, that the cause being argued upon the said several alleged errors, is thereupon submitted to the court, who, being satisfied in the premises, finds that there was no error in the proceedings and judgment of the court below, and the judgment is affirmed. The appellant now assigns as error: 1. That the court ruled that the affidavit for appeal did not contain facts of themselves entitling the defendant to a new hearing in the District Court. 2. That the court erred in refusing the defendant a new trial in the District Court. 3. In affirming the judgment of the justice of the peace. 4. In rendering judgment against the defendant.

I. M. Preston and *Wm. G. Thompson*, for the plaintiff in error.

N. M. Hubbard, (Proc. Atty. of Linn county,) and *Samuel A. Rice*, (Attorney-General,) for the State.

WOODWARD, J.—The defendant's affidavit for appeal, states: *First*. That there was no evidence showing that he owned or kept any intoxicating liquor whatever. *Second*. That one Mason, the officer who served the warrant, testified that he found a barrel of whiskey in the back yard of

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defendant's premises, which he took, but that he did not know to whom it belonged; and that the justice held that, as the liquor was found on the defendant's premises, it was presumed that he kept it with intent to sell; and on that evidence, and on that alone, rendered judgment against the defendant.

The affidavit must be taken as the basis, and if the facts are not correctly stated, the prosecutor must cause the certificate of the justice to be made, showing the actual state of the transaction. See *The State v. Bawrose*, 1 Iowa, 378. Taking the facts thus shown, and the testimony, as exhibited in the affidavit, we are of the opinion that the District Court should have granted the defendant a new trial, and that in refusing it, there was error. Therefore, the judgment is reversed.

KIMPSON v. HUNT.

Where in a suit commenced before a justice of the peace, by attachment, one M. was garnished as a debtor of the defendant, and required to appear on the day set for the trial of the cause; and where, on the day set for trial, the defendant failed to appear, and judgment was rendered against him by default; and where, when the garnishee appeared, one J. H. "also appeared, and claimed the money in the hands of M. to be his, and to be admitted to defend the same;" and where the plaintiff demanded a jury, and the jury returned a verdict for the plaintiff; and where judgment was rendered against M., the garnishee, for the money in his hands belonging to the defendant, and against the defendant, for the costs of suit, from which the defendant appealed, which appeal was allowed; and where from other entries on the docket of the justice, it appeared, that on the day the appeal bond was filed, the defendant filed with the court, a writing constituting J. W. H. his agent to prosecute the appeal, or settle the same, as he might think fit; that on the same day, the plaintiff filed with the justice a writing, authorizing the justice, to settle for her all matters in controversy between herself and defendant, by his paying the principal and interest of the debt, she agreeing to pay the costs; and that the agent of the defendant, being on the next day, informed of said proposition, accepted the same, and ordered the appeal not to be sent to the District Court; and where, on the filing of the papers in the District Court, the appeal, on motion of the

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plaintiff, was dismissed; *Held*, 1. That the judgment against the defendant for costs, in the proceedings against the garnishee, was a judgment that he had the right to appeal from; 2. That the entries made by the justice on his docket, subsequent to the allowance of the appeal, were not such entries as could be made by him in his official capacity, and were of no validity; 3. That the court erred in dismissing the appeal.

Appeal from the Wappello District Court.

IN a suit before a justice of the peace, commenced by attachment, in which the plaintiff recovered judgment against Thomas Hunt, for \$82.50, by default, John M. Mail was summoned as garnishee, on the affidavit of plaintiff, that the said Mail had in his hands \$61.25, due to the defendant. At the appointed time, Mail appeared before the justice, and as the transcript states, "John Hunt also appeared and claimed the money in the hands of John M. Mail to be his, and to be admitted to defend the same." Plaintiff demanded a jury, which was granted. Jury received and sworn. The case was fully investigated, and the jury returned the following verdict: "We, the jury, find for Nancy M. Kimpson." Judgment was rendered for plaintiff, against John M. Mail, for \$61.25—that being the amount in his hands—and against John Hunt, for the costs of suit, \$6.10. The defendant gave notice that he would appeal. On a subsequent day, John Hunt personally appeared before the justice, and filed an appeal bond, and an appeal was allowed. Other entries appear to have been made on the transcript of the justice to the following effect: "On the day the appeal bond was filed, the said John Hunt filed with the court, a writing constituting James W. Hunt his agent to prosecute the appeal, or settle the same, as he might think fit; and on the same day, the plaintiff filed with the justice, a writing authorizing him to settle for her all matters in controversy between herself and the Hunts, by their paying the principal and interest of the debt—she agreeing to pay the costs." And the justice further returns, in his transcript, that "the agent of John Hunt, being on the next day informed of said proposition, accepted the same, and ordered the appeal not

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to be sent to the District Court. On the filing of the papers in the District Court, the plaintiff moved the court to dismiss the appeal. The motion was sustained, and the appeal dismissed. There was no judgment for costs in the District Court. John Hunt appeals to this court.

H. D. Ives, for the appellant.

J. W. Summers, for the appellee.

STOCKTON, J.—There is great confusion and uncertainty in the transcript of the justice in the cause. He first rendered a judgment against Thomas Hunt, in favor of the plaintiff, for \$82.50. He next renders a judgment against Mail, the garnishee, for \$61.25, and against John Hunt, for the costs of the garnishee trial, for \$6.10. How it appeared to the justice that Mail was indebted to Thomas Hunt, in the amount of the judgment against him, is not shown by the transcript; neither do we understand, why John Hunt was permitted to claim the amount alleged to be in Mail's hands, as his own; nor why there should have been a jury trial of that question. There is difficulty in ascertaining what judgment it is, that John Hunt appeals from. There was no order made by the justice, admitting John Hunt as a defendant, in the place of Mail; nor anything to show his right to an appeal from the judgment against Mail. In fact, the whole record of the justice is in great confusion and obscurity, and it is difficult to arrive at any clear understanding of it. One thing is clear, however, and that is, that a judgment was rendered against John Hunt, in favor of plaintiff, for \$6.10, the costs of the garnishee suit. From this judgment, at least, he had the right to appeal to the District Court, and the order of the court, dismissing the appeal, is erroneous, unless some good reason can be arrived at for such dismissal, from the entries made by the justice in his docket, after the trial of the cause. These entries relate to a proposition by the plaintiff, to settle the matter in dispute between herself and the Hunts. The justice returns in his

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transcript, that the proposition being communicated to John Hunt, was accepted by him, and the justice was ordered not to send up the papers in the appeal to the District Court. It seems to us, that the justice had no authority to make any such entries or return, and they are of no validity. The entries could not be made by him in his docket *officially*. And, however true they may have been in point of fact, they do not constitute a part of the record, required by law to be kept by him, or entered on his docket. Code, § 2269. More than this, they do not, giving them the most liberal construction in favor of the plaintiff, show a payment, or satisfaction of the judgment.

We are of opinion, that the judgment of the District Court, dismissing the appeal, should be reversed, and the defendant, John Hunt, allowed to prosecute his appeal from the judgment against him for costs. This, in our opinion, is the only judgment he was entitled to appeal from.

Judgment reversed.

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The act entitled "An act to amend an act to incorporate and establish the city of Dubuque," provides for no appeal, or other mode of review, in cases arising under section three of that act.

A party aggrieved by the decision of a jury summoned under section three of the act, entitled "An act to amend an act to incorporate and establish the city of Dubuque," may file a petition in the District Court, to enjoin the city of Dubuque, from appropriating a part of his lot, for the purposes of a street, until a just compensation has been ascertained and paid; and the party has a right to have that compensation determined by a competent tribunal.

Appeal from the Dubuque District Court.

It appears that the city of Dubuque, proceeded to appropriate a part of the complainant's lot as a street, under Stat. 1852-3, chap. 54 (Acts 1853, 89, § 8). Under the proceed-

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ings there directed, a jury awarded the plaintiff twenty-five dollars damages, which was tendered him, and which he declined to receive. He files his bill in Chancery, praying an injunction against the city, and damages.

The respondent demurs, and the demurrer is overruled, and the record says that the issues were found for the complainant, and that the damages being agreed upon by the parties at forty dollars, judgment was rendered in favor of the complainant for that amount. The corporation appeals.

G. P. Waldron, for the appellant.

Willse & Blatchley, for the appellee.

WOODWARD, J.—The respondent demurred to the petition upon the grounds: 1st. That the District Court had no jurisdiction of the matter, as it came entirely within the provisions of the act before cited. 2d. That it appeared from the petition, that the damages had been ascertained and tendered. 3d. That the plaintiff complains only that the jury were governed by wrong principles, in ascertaining the damages, inasmuch as they took into consideration the enhanced value of the remainder of the lot. The defendant now assigns that the court erred in holding: 1st. That the District Court could take cognizance of the suit. 2d. That a party may thus disregard the proceedings under the statute, and institute an original action. 3d. In holding that when land has been appropriated for the purposes of a street, the city is liable in trespass for damages, as for an intrusion. 4th. In holding that the jury had made their assessment on wrong principles. 5th. In overruling the defendant's demurrer. The defendant, under his second cause of demurrer, says that the remedy of the aggrieved party, in such cases, is by appeal. But no appeal is given in the above act. This leads us to notice the provision on which the proceedings were founded. They are found in Acts of 1852-3, 90, § 3, in an act to amend an act to incorporate and establish the city of Dubuque. The enactment is, that when the damages

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cannot be otherwise agreed upon, the city council shall cause to be summoned six freeholders, who being first duly sworn for that purpose, shall inquire into and take into consideration, the benefit as well as the injury which may accrue, &c. And upon payment of the amount found, the owner shall convey to the city forever, &c. It is the city that is to take the necessary steps, and it is to do this before it can take the property.

There is no provision for any judicial officer, or any other officer of the law, taking part in the proceedings, and directing, governing, or in any manner supervising them.

Then suppose a party to be aggrieved by the amount of damages found, or believes the jury have been governed by erroneous rules or principles, in arriving at the estimate of damages; where is his redress? No appeal is given, nor other mode of review. Property of any amount may be taken for public use, and the party has no redress for any error, mistake, misconduct, or partiality. The principles of our law require, that he should have a remedy, and, in the present instance, either this proceeding must be considered invalid, or the party must be permitted to come into a court of justice, and enjoin it, until a just compensation has been ascertained and paid. And he has a right to have it ascertained by a competent tribunal.

No objection is made to this petition, in regard to its propriety in any respect, except as suggested in the demurrer; and we do not go beyond the case presented to us. The decree of the District Court is affirmed.

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Where by a rule of the District Court, the time for answering is different from that fixed by the Code, it is not essential that the original notice should inform the defendant of the time when, by such rule, he is required to answer. A rule of the District Court, fixing the time within which a defendant must

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answer, is law; and a defendant is presumed to know when his answer should be filed.

Where a plaintiff, in his original notice, requires a defendant to answer by a day different from that fixed by the rules of the court, the plaintiff should be held to the time fixed in his notice, and not be permitted to have judgment entered before that day.

Where by a rule of the District Court, parties defendant were required to plead, answer, or demur, on or before the morning of the *first* day of the term; and where an original notice notified the defendants to appear and answer, on or before the morning of the second day; and where at the return term, a motion was made to quash the original notice, for the reason that the said notice does not inform the defendant of the time when, by the rules of the court, they are required to plead, which motion was sustained by the court, the notice set aside, and the cause continued for want of service; *Held*, That the court erred in quashing the original notice.

Appeal from the Washington District Court.

MOTION to quash the original notice. The court had, by general rule, adopted and entered of record: "ordered that parties defendants be required to plead, answer, or demur, on or before the morning of the *first* day of the term." The notice in this instance served on the defendants, required them to appear and answer to the petition, on or before the morning of the second day of the term.

At the return term, a motion was made to quash the notice, for the reason "that said notice does not inform the defendants of the time when, by the rule of the court, they are required to plead." The court sustained the motion, set aside the notice, and continued the cause for want of service. The plaintiffs excepted to the ruling of the court, and appeal.

J. D. Templin, for the appellants.

No appearance for the appellees.

STOCKTON, J.—The notice does not inform the defendants of the time when, by rule of the court (different from the time fixed by statute), they were required to answer the petition. Was this such a defect or irregularity, as authorized

the court to set aside the notice, and continue the cause for want of service?

The effect of the rule is, to change the law which requires the defendant to plead, answer, or demur, on or before the morning of the second day of the term, and the defendant may be required to answer by the morning of the first day. The appellants claim that this rule having the force of law, the defendants were presumed to know it, and complainants were not bound to inform them, in the notice, of the time when their answer should be filed.

The object of the original notice is, to place the defendant in court, subject to its jurisdiction, and by informing him of the nature of the action, to enable him to prepare for his defence. There may undoubtedly be such defects and irregularities in the notice, as should require the court to set it aside. When it essentially fails to meet the requirements of the statute, or to fulfill the purpose for which it was intended, it should be set aside. The notice in this case, is sufficiently regular and formal to place the defendants in court, and require them to plead. They are informed of the nature of the action against them, and of the substance of the remedy sought by the petitioners. Must they also be informed of the time when, by the rule of the court, they are required to answer? Is this an essential requisite of the notice? We do not think it is. It cannot be claimed that the notice, by requiring the answer to be made on the second, changed the rule of court which required it to be made on the first, day of the term. If that rule is the law, then the defendants must be presumed to know when their answer was to be filed. If the notice had been silent on this point, and had omitted to require them to answer on any particular day, still the defendants must be presumed to know by what day the law required them to answer. If the notice requires their answer by a wrong day, will the presumption of law not be the same, that defendants knew their answer must be put in on the first? We are aware that the question may be asked, on what day are defendants to put in their answer, when by notice, duly served, it is required to

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be put in on the second day, and when, by rule of court, it must be put in on the first? May judgment by default be taken on the first day? We are clearly of opinion that the plaintiff must be held to the day fixed in the notice. Much inconvenience might arise, and great injustice be done, by suffering judgment to be entered before the day by which defendants were notified to answer. Although the defendant will be presumed to know when his answer should be made, yet if plaintiff has notified him to answer on a wrong day of the term, he should not be permitted to have judgment entered before that day. There may be counties in which the rule above referred to is adopted, and in which the whole business of the term is crowded into one day. In such case, the plaintiff should pay the penalty of his own carelessness, and have his cause continued until the next term. If we look at the matter in view of the prejudice, which a refusal to set aside the notice in this case, might work to the interests of the defendants, we shall be at a loss to discover it, in the additional day allowed them to put in their answer. It may fairly be presumed that the plaintiff will be sufficiently watchful of his right, to require the answer of the defendant, at the shortest possible time allowed by law, or the rules of the court. If he does not require the answer on the first day of the term, it should hardly be allowed to the defendant to urge as a fatal defect in the notice, that it gives him one day longer in which to prepare his defence, than is awarded by the rules of the court. We see, therefore, no sufficient reason for quashing the notice. For every purpose for which a notice is requisite or useful, it was sufficient. The defendants cannot be any better or more fully informed of the nature and cause of the claim made against them, by any new notice served upon them, than they have been informed by the one objected to and set aside. It did not, it is true, follow the strict letter of the law, and inform defendants of the time when, by rule of court, they were required to plead. This, the law presumes, that they already knew.

And although the plaintiffs have required the answer to

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be made on a different day from that fixed by law, yet as any inconvenience which might result therefrom, must be borne by them and not by defendants, and as the time to defendants to answer is extended, we do not see that the rights or interests of the parties, or the integrity of the statute, required that the notice should be set aside. When defendants are once in court, the plaintiffs are entitled to a rule against them, to plead, answer, or demur, at such time as the court may direct.

The rule to answer on the first day of the term, is a privilege of which the plaintiffs may be presumed to be ready and willing to avail themselves. If they rule defendants to plead at a subsequent, or even distant day of the term, we do not see that any inconvenience would arise to defendants, of which they should complain. They may answer as much sooner as they choose. That there should be certainty as to the time the answer is required, is an objection obviated by the fact, that in the absence of a time fixed by the party in his notice, the law fixes the time when the pleading must be filed. See the case of *Lemons v. French*, December Term, 1853.

The judgment of the District Court quashing the notice, is reversed, and the cause remanded.

Judgment reversed.

BRYAN v. THE STATE OF IOWA.

Where several bills of exception referred by letters, as A, B and C, &c., to motions, demurrers and pleadings, and the papers in the record, referred to, were marked L, M, N, &c., and there were no papers in the record, corresponding with the letters named in the bills of exception; *Held*, That the appellate court would be justified in disregarding the papers not correctly referred to in the bills of exception.

Neither the jurisdiction, nor the proceedings, of courts and magistrates, as existing at common law, were unalterably settled and defined by the constitution of the United States, at the time of its adoption.

Section 11 of the first article of the constitution of the state of Iowa, which

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provides that no person shall be held to answer for a criminal offence, unless on presentment or indictment by a grand jury, except in cases cognizable before a justice of the peace, does not limit the jurisdiction of justices of the peace to causes that were cognizable before that officer, at the time of the adoption of that constitution.

The eleventh section of the first article of the constitution of Iowa, has a prospective sense, and embraces such causes as may be made cognizable before justices of the peace.

The state law may make offences of inferior grades, originally cognizable by inferior courts, and the General Assembly may authorize trial by a jury of a less number than twelve men, in such inferior courts.

On appeal to the District Court, in a criminal case, the record from the justice constitutes no part of the evidence, on the trial anew in the District Court.

Where in a proceeding before a justice of the peace, under the act "for the suppression of intemperance," approved Jan. 22, 1855, under which certain liquors were seized, the owner of the liquors filed a plea to the jurisdiction of the justice, which was overruled; and where the said owner then moved to dismiss the suit, for the want of jurisdiction, which having been overruled, he then demanded a trial by a jury of twelve men, which was also overruled, and the said liquors were found to be forfeited by a jury of six men, and judgment rendered upon their verdict, accordingly; and where the judgment of the justice, on appeal, was affirmed in the District Court; *Held*, That there was no error in the proceedings.

Error to the Madison District Court.

THIS was a criminal proceeding commenced before a justice of the peace, charging that intoxicating liquors were kept upon the premises of the plaintiff in error, with intent to sell the same, in violation of the act for the "suppression of intemperance," approved January 22, 1855. A warrant of search and seizure was issued, which was returned served, by seizing three barrels of whiskey. A notice was then issued to said Bryan, requiring him to appear at the office of the justice, on the 3d day of April, 1856, and show cause why the said liquors should not be declared forfeited. On that day, Bryan appeared before the justice, and filed a plea to the jurisdiction of that officer, and alleging that the District Court of that county, alone had jurisdiction of the offence. This plea was overruled by the justice, to which ruling, the said Bryan excepted. He then filed a motion to dismiss the suit, for the following reasons:

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1. The amount in controversy is above the jurisdiction of a justice of the peace, as fixed by the constitution of this state.

2. That there is no constitutional law of this state, authorizing summary proceedings of this nature.

3. This proceeding is not authorized by the constitution and laws of this state.

4. This proceeding is in violation of, and infringes upon, the individual rights guarantied to the defendant, by the constitution of the United States.

The motion to dismiss was overruled, and the defendant excepted. A motion for a change of venue, having been filed and overruled, the defendant demurred to the information, alleging twelve grounds of demurrer, which it is unnecessary to recite, which was also overruled by the justice, and to which ruling the defendant excepted. Bryan then filed a paper, setting up causes why the said liquor should not be destroyed, and also claimed a trial by a jury of twelve persons. A jury of six having been summoned and impaneled to determine the matter in issue, the defendant filed his protest against such jury. The jury returned a verdict, that the liquors were when seized, owned and kept by Bryan, for the purpose of being sold in violation of law; and thereupon the justice rendered judgment of forfeiture of said liquors, and ordered the same to be destroyed, in pursuance to the statute. The defendant then filed his affidavit for an appeal to the District Court, alleging *twenty-two* grounds of error in the proceedings before the justice, the most material of which, are the following:

1. The justice erred in not sustaining the plea to the jurisdiction of the justice.

2. The justice erred in not sustaining the motion to dismiss the suit.

3. The justice erred in overruling the demurrer to the complaint.

4. The justice erred in not sustaining the demand for a jury of twelve men.

5. The justice erred in requiring defendant to go to trial before a jury of six men.

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6. This case should have been commenced by indictment in the District Court.

In the District Court, on hearing the errors assigned, that court held, that there was no error in the proceedings before the justice, and affirmed the judgment rendered by that officer. The defendant then sued out this writ of error, and in this court, assigns for error, the various rulings complained of in the court below.

E. W. Eastman and *P. Gad Bryan*, for the plaintiff in error.

Samuel A. Rice, Attorney-General, for the State.

WOODWARD, J.—This is a criminal proceeding, commenced before a justice of the peace, under the act for the suppression of intemperance, approved January 22, 1855. The question of the constitutionality of the act is made in this case, and nearly all the questions raised in the cause are the same that were presented and fully discussed and considered, in the cases of *Santo et al. v. The State*, 2 Iowa, 165, and *Sanders v. The State*, 2 Iowa, 230. As those questions have been so recently debated, and as the act has since that time been modified, it will not be thought necessary to review those which have been decided, nor to enter largely into the consideration of those which are now presented for the first time. The cause has been diligently and carefully prepared; the questions are well presented and fairly considered; but it will be advisable to present those questions only, which were not made in the cases above referred to.

There are several bills of exceptions referring by letters, as A, B, C, &c., to the motions, demurrers and pleadings, to which they relate, but there are, in the record, no such papers as are thus referred to; that is, none with corresponding marks or letters. The papers in the record, are marked L, M, N, &c. This would justify the court in not regarding these papers, and consequently the bills of exception, but then the case would be gone. This is adverted to, that the

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taking notice of papers in such condition, may not be drawn into precedent. Concerning the identification of papers, see *McCrary v. Crandall*, 1 Iowa, 117; *Brewington v. Patton et al.*, 1 Iowa, 121; *Baltzell v. Nosler*, Ib. 590; *Ewing v. Scott*, 2 Ib. 447; *Claussen v. La France*, 1 Ib. 226.

First. The defendant pleaded to the jurisdiction of the justice of the peace, and contended that the matter and cause were cognizable originally only by the District Court, by indictment or presentment. He urged that at common law, there was no information before a justice of the peace, but that when the proceeding was in this manner, it was presented by the attorney for the State, in the same court where indictments were tried, and was tried in the same manner. He claimed that the constitution of the United States guaranteed to him all the rights he had at common law, when that constitution was adopted. Waiving for the present, the question of the applicability of the United States constitution to this matter, it must be remarked, that the foregoing position of the defendant, claims that the jurisdiction, and in some respects the proceedings, of courts and magistrates, are fixed indelibly by the United States constitution, as stamped upon the common law then existing. This thought cannot be entertained. It gives an unalterable meaning to the term "information," which in the act in question, really signifies no more than "complaint." But above this, it cannot be conceded, that the jurisdiction of courts and magistrates, and their proceedings, are thus unalterably settled and defined. Again: this case is not one of a "capital or otherwise infamous crime," which, by the constitution of the United States, must be tried under indictment or presentment. The defendant further urges, that section 11, of article 1, of the constitution of Iowa, has reference to cases cognizable before justices of the peace at the time of its adoption, and that their jurisdiction must be limited to such causes. This construction cannot be admitted. The section has a prospective sense, and embraces such causes as may be made so cognizable.

Second. The defendant claims the right to a trial by a jury

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of twelve, in the first instance, before the justice of the peace. We believe with the defendant, that a jury means twelve men, and that in trials for criminal offences, the defendant has a right to a trial by such a jury; but we also believe, that the state law may make offences of inferior grades originally cognizable by inferior courts, and that the state constitution may provide, as in section 9, article 1, that the General Assembly may authorize trial by a jury of a less number than twelve men, in such inferior courts. If the party had claimed a trial by jury in the District Court, it would have presented a different question. But he does not appear by the record, to have done so, although he seems to claim it in his argument; but he appears to have rested on the questions of law which were made before the justice, among which was his right to a jury of twelve in that inferior tribunal. The defendant falls into an error in his argument. He reasons that on an appeal, the record of conviction before the justice, becomes evidence. This is not so. The record from the justice constitutes no part of the evidence on the trial anew in the District Court. There the case is to be made out anew against the defendant, without reference to the fact of a conviction below. But if the defendant has reference to the construction given to section 3361 of the Code, in *Baurose v. The State*, 1 Iowa, 374, however correct he may seem to be, his position is controlled by that decision. But as he did not claim a trial by jury in the District Court, this argument is of little consequence in the present cause.

Third. The defendant objects that this statute attaches a penalty to the right of appeal, in requiring a bond, in a penal sum, with sureties, conditioned to pay whatever sums may be adjudged against him in the further progress of the suit; and he quotes the following proposition, and the authorities following, to sustain it as law: "A state legislature cannot make the right of trial by jury, depend upon giving bond with surety, for the payment of the penalty and costs," citing *Green v. Briggs*, 1 Curtis, 311; 1 Kent, 613, note (2) (last edition). However true this doctrine may be, (and its

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apparent plausibility cannot be denied,) it would not give the defendant the right claimed before the justice of the peace, but it would affect the terms on which he might call for it in the District Court. It does not appear from the transcript, that the defendant gave bond and surety, on his appeal to the District Court; and if he did not, he stood in no position to test the principle above claimed by him. But we must repeat, that this court is not informed that he demanded trial by jury in the appellate court. He went up solely upon the twenty-two questions of law made before the justice of the peace, and these alone were adjudicated. All the points made by the defendant, not embraced in the former cases above referred to, have thus been noticed, and we see no cause to reverse the judgment of the court below.

I desire to take this occasion to say, that I differed from the majority of the court in the case of *Baurose v. The State*, 1 Iowa, 374, and wrote an opinion accordingly, at the time, which, for some reason, was not filed and published with the cause; and as the question may still arise, I do not wish to be considered as held by that decision.

Judgment affirmed.

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WIDNER v. HUNT.

An affidavit for a continuance, on the ground of the absence of witnesses, which does not show that any effort has been made to procure their attendance, nor any excuse for the want of that diligence which the law requires, is insufficient.

In the absence of a party, there is no good reason why an affidavit for a continuance, should not be made by the attorney, if the interest of his client requires it, but the absence of the client should be shown in the affidavit.

It is not competent for an attorney to swear to facts which are solely within the knowledge of his client, unless the client is absent.

An affidavit for a continuance, on the ground of the inability of a witness to attend the court, should show that a knowledge of such inability on the part of the witness, was not known to the party asking the continuance,

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before the commencement of the term, and in time to have taken the testimony by deposition.

A palpable case of injustice must be presented, before the appellate court will interfere with the discretion of an inferior court, in granting or refusing a continuance.

The practice of allowing affidavits for a continuance to be amended, or a new affidavit to be filed, when the first has not made out the case desired to be shown by the party, is one which the courts should permit with great caution, if permitted at all.

It is within the discretion of the District Court, to refuse leave to amend an affidavit for a continuance, adjudged insufficient, or to file a new one, unless for the purpose of presenting facts which have transpired, or come to the knowledge of the party, since the filing of the first.

Appeal from the Polk District Court.

SUIT to recover the value of certain property claimed by plaintiff, and taken and sold by defendant, as constable, on an execution against one Wright. The defendant's answer was a general denial of the petition. The plaintiff applied for a continuance, and filed an affidavit for the purpose of obtaining the same. The motion was overruled. On the next day, the application was renewed, and the plaintiff was permitted to file a second affidavit, on which the motion was based. The cause for continuance set forth in both affidavits, is the absence of a witness. The second application was overruled by the court, to which plaintiff excepted; and when the cause was called, plaintiff not being ready for trial, the suit was dismissed at plaintiff's costs. From this judgment of the court, plaintiff appeals, and assigns for error, the refusal to grant a continuance, on the showing made. The contents of the affidavits for the continuance, are sufficiently stated in the opinion of the court.

Brown & Elwood, for the appellant.

Finch & Crocker, for the appellee.

STOCKTON, J.—We think there was no error in overruling the motion for a continuance. The first affidavit does not

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show that any effort had been made to procure the attendance of the witness, nor any excuse for the want of that diligence which the law requires. The second affidavit states, that the affiant had been informed that the witness was in a delicate state of health, and unable to be in attendance at the term of the court. The affidavit is made by the plaintiff's attorney, who states that he had once before tried the cause, and is as well acquainted with the facts as the plaintiff himself. He deposes that he was not advised of the inability of the witness to be in attendance at that term of the court, until so informed by the sheriff, on the previous day. No reason is given why this affidavit was not made by the plaintiff himself. In the absence of the party, there is no good reason why it may not be made by the attorney, if the interest of his client requires. It is not shown in this case, however, that the client was not present, and able to make the necessary affidavit himself. It is not competent for the attorney to swear to facts which are solely within the knowledge of his client. The second affidavit does not allege that the fact of the inability of the witness to attend the court, was not known to the plaintiff before the term, and in time to have taken her testimony by deposition. We are, for these reasons, inclined to affirm the judgment of the District Court, in overruling the motion for a continuance. A palpable case of injustice must be presented for our consideration, before we will interfere with the discretion of the inferior court, in granting or refusing a continuance.

In this instance, there is another reason why we are disinclined to interfere with its decision. The practice of suffering affidavits to be amended, or a new affidavit to be filed, when the first has not made out the case desired to be shown by the party, is one which may be productive of much evil, and which the courts should permit with great caution, if permitted at all. The party making the application has the ready means of knowing what the statute requires he should show, in order to obtain a continuance; and where the facts are, at the time, within the knowledge of the party, there is no reason why he should not be required to make out his

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case at once. It is certainly within the discretion of the court, to refuse leave to amend an affidavit adjudged insufficient, or to file a new affidavit to make out his case, unless for the purpose of presenting facts which have transpired, or come to the knowledge of the party, since the filing of the first. Both the original and the amended affidavit, being insufficient to make out a good cause for continuance, for the reason above set forth, the judgment of the District Court is affirmed.

Judgment affirmed.

CAMPBELL & BROTHERS v. AYRES.

Where it appeared from affidavits in a cause, that the cause was tried in the court below, on the last day of the term; that while the jury were in their room, deliberating on their verdict, the court sent them oral instructions, by the bailiff; that after the jury returned a verdict for the plaintiff, the defendant moved the court to set aside the verdict, and grant a new trial; and that while his counsel was arguing this motion, the judge adjourned the court *sine die*, refusing either to sustain or overrule the motion, and refusing to grant the counsel time to prepare a bill of exceptions, the judgment of the District Court was reversed, and a new trial granted.

Appeal from the Polk District Court.

THIS was an action commenced before a justice of the peace, to recover eighty dollars, as the value of a yoke of oxen and a yoke, sold to defendant, with interest thereon, and seven dollars and sixty cents as costs incurred by the plaintiffs in a suit by them against Benton Post, upon a note of said Post, transferred to plaintiff by the defendant. It appears, that the defendant partly paid for the above chattels, by delivering to plaintiff a promissory note for fifty dollars, made by said Post, payable to one Perkins or order, and not indorsed; and that the plaintiffs sued said Post upon the note, before a justice of the peace, and failed in their action. The bill of exceptions from the District Court states that the

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plaintiffs proved that the note was "traded" to them as above stated; that they sued the maker, Post, in their own names, but did not prove, (in the District Court,) that the note was assigned to said Campbell & Brothers; that they offered Post as a witness, to prove that he had paid the note before Ayres had "traded" it to the plaintiff. This was objected to, and the objection was overruled, and the defendant, Ayres, excepted. The defendant then requested the court to instruct the jury, that Campbell & Brothers could not maintain a suit, ("had no right to bring a suit,") in their own names, on the note payable to Perkins or order, unless the note was assigned to them—which instruction was refused. It also appears, by affidavits, that the trial took place on the last day of the term; that while the jury were in their room, considering on their verdict, the court sent oral instructions to them, by the bailiff, directing them to allow the note as evidence; that after the jury returned with a verdict in favor of the plaintiff, the defendant moved the court to set aside the verdict, and grant a new trial; and while his counsel was arguing this motion, the judge adjourned the court *sine die*, refusing either to sustain or to overrule the motion, and refusing to grant the counsel time to prepare a bill of exceptions. The defendant appeals.

Jewett & Hull, for the appellants.

C. Bates, for the appellees.

WOODWARD, J.—Undoubtedly a portion of the business of the District Court is done with a haste, or under other circumstances, very unfavorable to regularity and safety. This may sometimes occur through necessity, as when a verdict is rendered in the last hours of the term. But as a party's only security lies in the right of appeal, we hold it of the first degree of importance, that the court should enable him to place his cause in such position as he may choose, consistent with truth. The heart of a cause, the weightiest questions and the largest interests, may be embraced in a

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motion for a new trial, or in a bill of exceptions. There is no part of a cause which is of more importance. In the present case, it appears that the court refused to rule either way upon the defendant's motion, refused time and an opportunity to prepare a bill, and adjourned court *sine die*, in the midst of his argument. If the court were disinclined to hear the argument, there were other more appropriate methods of signifying it; and if the term were so near expiring, that there was no time to do what was asked, the motion and all proceedings should have been continued to the next term. In relation to the alleged irregular manner in which the matter is brought before this court, the answer is, that the action of the court cut off all the usual and regular modes of proceeding. The ordinary rules and methods are adapted to the usual and orderly manner of conducting a trial; if the court cuts them off in an unusual manner, the remedy must be sought in an unusual method. One of the duties of this court, is to exercise a supervisory control over the other tribunals, and it would be a reproach to the law, if the extraordinary action of the court could be shown only by the usual methods, which presuppose an ordinary action.

The very complaint here is, that the court refused to hear—to rule on the questions—to permit a bill of exceptions—to allow a motion for a new trial; but adjourned *sine die*, in the midst of the proceedings. After this, to require that these things should appear in the usual manner, does not carry the air of sincerity. On this ground, a new trial must be granted.

In a bill of exceptions taken at an earlier stage of the cause, the defendant saves the point that the court refused to instruct the jury, that the plaintiffs could not maintain their action on the note of Post before the justice, in consequence of the note not being indorsed, whilst the action was in their own name; but he has not assigned this as error. Yet, as the cause may be tried again, we will say that the instruction should have been given. It had a material bearing on the question, *how* the plaintiffs came to fail in their action before the justice.

The defendant also urges an objection to admissibility of the testimony of Post, who gave the note first sued on. His bill of exceptions covers this, but he assigns no error upon it, either as to the admissibility of the testimony, or as to the competency of Post as a witness. The judgment of the District Court is reversed and set aside, and a new trial is granted.

WADE v. CARPENTER *et al.*

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A person appointed guardian of a minor, having no father, under the act entitled "An act concerning minors, orphans and guardians," approved January 25, 1839, became guardian of the property, as well as of the person, of the ward.

Proceedings by the guardian to sell the real estate of the ward, under the act of January 25, 1839, did not abate by the resignation of the guardian.

Where a guardian of the person and property of the minor, filed a petition in the county court, to sell the real estate of the ward, and before a hearing upon the petition, resigned; and where, upon the appointment of another guardian, the proceedings to sell the real estate, were carried on, without filing a new petition, or serving a new notice upon the ward, and a license to sell was granted to the new guardian, as successor of the one in whose name the proceedings were commenced; *Held*, That the proceeding for license to sell, did not abate, by reason of the resignation of the first guardian; and that the license was properly granted to the second guardian.

Where in a proceeding in Chancery to set aside a guardian's sale of real estate, it was alleged that the ward never had any legal notice of the application to sell the real estate; and where it appeared from the record of the county court, which granted the license to sell, that it had been "proved to the satisfaction of that court, that notice, according to law, had been given" of the hearing of said petition, to sell said real estate; *Held*, That the decision of the county court on the sufficiency of the service of notice, could not be examined into collaterally.

The approval by the county court of a sale of a minor's real estate by his guardian, as required by section 1506 of the Code, in order to make the sale valid, is not a mere formality.

A deed takes effect from delivery; and a guardian's deed cannot be delivered until after it is approved by the county court. Such approval, is an affirmation, not merely of the deed, but of the sale.

Chapter four of the Code, was intended to save all existing relations, duties and rights, until they were duly superseded under the provisions of that statute.

Wade v. Carpenter et al.

Appeal from the Des Moines District Court.

THIS was a bill in Chancery, filed by Wade, a minor, by his guardian, to set aside and hold for naught, a sale of a certain parcel of land, sold by Levi Hagar, claiming to be guardian, and therefore properly authorized. The bill alleges, that the premises were not derived from either parent of the complainant; that one Nancy Yates, (formerly Nancy Wade,) as mother and guardian of complainant, without having been appointed guardian of his property, and without having given bond, and without taking any oath, and without being guardian in fact—as guardian, on the 14th February, 1852, filed in the office of the county court of Des Moines county, a petition to sell the real estate, without describing it; that, on the 18th February, she resigned her supposed guardianship, and on the 19th February, the said Levi Hagar was appointed guardian of complainant's property, without his knowledge or consent; that said Hagar never filed a petition for leave to sell, nor did he, or said Nancy, ever give complainant notice of any application or petition, nor did any one serve him with a copy of the petition, nor did he appear to the same; that on the 1st March, 1852, the said county court granted said Hagar license to sell, without his having filed a petition or given notice; that said Hagar, on the 2d of March, 1852, without appraisement or notice, and at private sale, sold, and executed a deed of the same, to said Carpenter and Tallant, (two of the defendants herein,) for less than one-half the true value thereof, and without the knowledge or consent of complainant; that on the 3d of March, Hagar filed a bond, with Carpenter and Tallant as sureties, which he alleges to be void; that complainant has never received any of the purchase money, and that the said proceedings are, in other respects, illegal, defective and insufficient. The complainant charges that the said proceedings are fraudulent on the part of all the parties concerned therewith; that the deed from Hagar to Carpenter and Tallant, is outstanding; that this, with the proceed-

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ings of record in the county court, are a cloud upon complainant's title, and render the same unquiet; that the premises are in the possession of said Carpenter and the other respondents, who are claiming title thereto, and holding adversely; and that when the said defendants respectively obtained an interest in said premises, they had full notice of all the facts and circumstances before set forth. He then prays that the certain persons may be made parties; that they may answer; that the said deed, and proceedings and record, may be canceled and set aside; and that the premises may be restored to him; and for such further relief, &c. The defendants filed answers, but it is unnecessary to set them out in detail. The court found in favor of the respondents, and the complainant appeals. The facts in the case, and the questions arising thereon and determined, will appear from the opinion of the court.

C. Ben Darwin, for the appellant.

David Rorer, for the appellees.

WOODWARD, J.—The complainant makes several questions in his argument, which are not suggested by any statements or charges in the bill. We will follow the complainant's case, as presented in his petition. The first question arises on the averment that Nancy Wade (Yates) was not guardian of the property of the minor; and it is further alleged, that she was not guardian even of the person. It appears by the record, that she was appointed in September, 1843, whilst she was the widow of William Wade. She afterward intermarried with Yates. In February, 1852, she filed her petition for license to sell; and it is claimed that by her appointment, she was not guardian of the property, and therefore had no right or power to file such petition; and that, consequently, the license was void. She was appointed under the act of January 25, 1839. Rev. Stat. 1843, 430. The first section of this act provides, that the Court of Probate should appoint guardians for minors, the father

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being dead, and in all cases where the minor was possessed of, or entitled to, real or personal estate. Those above the age of fourteen years, might choose their guardians. By section third, when a minor, having a father living, was entitled to real or personal estate, not derived from his father, the father was to be notified to show cause why a guardian for such minor should not be appointed; and if no sufficient reason was shown, one should be named; and if there was no cause to the contrary, the father was entitled to the guardianship. When any person other than the father was appointed, he was to have the charge and management of the estate, but no control over the person of the minor. By section four, if the father were insane or incapable, the court should appoint, as though the father were dead. By section five, guardians, by virtue of their office, as such, had power in all cases to prosecute and defend for their wards. By section six, "The Court of Probate shall take, of each guardian appointed under this act, bond with good security, &c., conditioned as follows." Then follows a form for the condition, in which the only words which can refer to the character of the guardianship, are: "A. B., who has been appointed guardian for C. D.;" and the only words relating to property of any kind, are: "And shall comply with all orders of said court, relative to the goods, chattels and moneys of such minor, and render and pay to such minor all moneys, goods and chattels, title papers, and effects, which may come to" his possession.

It seems, from these provisions, that when a guardian was appointed under this act, there being no father, he became guardian of the property, if there were any, as well as of the person. Two or three provisions indicate this. There is but one bond prescribed for all cases, and that certainly contemplates a wardship in respect to the property. Now, the bond given by Mrs. Wade, in 1843, is in the precise terms of the above act; so that we do not perceive weight in the objection that she was not guardian in respect to the property; and consequently there is no objection to be made to her right or power to file a petition to sell.

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The next question arises on these facts: She filed her petition on the 14th February, 1852. While it was pending, namely, on the 18th February, she resigned her guardianship, and on the 19th, Levi Hagar was appointed. Here it is objected, that on her resignation there was no guardian, and the petition abated; and that there was no petition by, and notice from, Hagar as guardian, so that the license issued to him had no foundation in law. This objection does not appear to us well made. The petition would not abate by death or resignation. The matter is analogous to the case of an administrator. It is true that the petition would abate, at common law; but at no time, under our law, either in the present or past system of practice, would a suit by an administrator be abated by his death or resignation; and though *some* time would necessarily pass between such a termination of the office and a new appointment, yet it has never been regarded as abating the suit; but the new appointment has relation to that event, so as to cover all needful matters. There is no necessity, either in reason or in law, that the resignation of Mrs. Yates should be held to abate her petition, and that Hagar should be held to commence anew—filing a new petition and giving a new notice. Hagar was appointed under the Code, where a distinction more manifest, is maintained between a guardian of the person and of the property, and his appointment is expressly, and in terms, over the property.

But, again, it is urged that no legal notice of the petition was given to the minor. The application to sell was made under the Code, and section 1501 directs that a copy of the petition, with a notice, &c., shall be served on the minor personally. The question occurs on the service. This was made by one Walbridge, who does not appear to have been an officer of the law, but makes affidavit that he served by reading. In the first place, the record of the court is full and explicit, and would seem to settle the question of notice. It says: "And thereupon, it having been proved to the satisfaction of the court, that notice, according to law, has been given of the hearing of said petition, and all and singular

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the premises being seen and heard, it is ordered," &c. It then refers to Hagar being the successor of Nancy Yates, who had resigned, and concludes by ordering, "that he have authority to sell said real estate, as in such case by statute provided, as fully and amply as said Nancy Yates might have been empowered to do, were she still guardian; and that said Hagar have authority to sell said real estate in such manner and upon such terms as he may deem most expedient." In the next place, Walbridge gives testimony in the cause, showing that he served by copy, as well as by reading. This is not inconsistent with his return; and even if not properly admissible in the present suit, serves to show that the county court may have had evidence before it, which enabled it to make the record, that "thereupon, it having been proved to the satisfaction of the court, that notice according to law has been given," it is ordered, &c. See *Cooper v. Sunderland*, 3 Iowa, 114.

It is then objected that Mrs. Yates gave no bond, and took no oath. It is presumed that reference is here intended to section 1504 of the Code, for, as to her appointment, she complied with the law then in force, and her petition to sell is verified by oath, under section 1501. Section 1504 relates to the sale, and she does not accomplish this, but Hagar does it, and no objection is made as to him, in this respect. Other objections are covered by the license granted by the county court, "to sell in such manner, and upon such terms, as he may deem most expedient;" and by the approval of the said court. This approval is not a formality. Code, § 1506. Deeds may be made by the guardian in his own name, but they must be returned to the court, and the sale or mortgage be approved, before the same are valid. This approval is not a mere formality. Code, § 1507. In regard to administrators, see Code, § 1355. And by the terms of section 1506, it is the sale or mortgage, and not merely the deed, that is approved, as is urged in the argument.

Another argument urged is, that the law under which Mrs. Wade was appointed guardian, was repealed, and that

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consequently her authority ceased. But no such effect was intended in the enactment of the Code. Chapter four was intended to save all existing relations, duties and rights, until they were duly superceded under the provisions of that statute. No sufficient fraudulency in the proceedings is shown, to invalidate the sale in the hands of even Carpenter and Tallant, who were the sureties of Hagar; and still less is there to affect the other defendants, who bought under them. Again; a further objection is made, that the deed bears date the 2d of March, whilst the guardian's bond is not approved until the 3d of March. There is evidence that the date of the deed is a mistake by one day. But even if it were not so, why should this date control the whole matter? The deed takes effect from its delivery, and it cannot be delivered until approved, which the record shows to have been done on the third, and which is an affirmation, not merely of the deed, but of the sale.

The objections first made in the argument, not based upon any allegations in the petition, and not being of a nature to be raised on the hearing for the first time, are passed by.

The decree of the District Court is affirmed.

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before the commencement of the term, and in time to have taken the testimony by deposition.

A palpable case of injustice must be presented, before the appellate court will interfere with the discretion of an inferior court, in granting or refusing a continuance.

The practice of allowing affidavits for a continuance to be amended, or a new affidavit to be filed, when the first has not made out the case desired to be shown by the party, is one which the courts should permit with great caution, if permitted at all.

It is within the discretion of the District Court, to refuse leave to amend an affidavit for a continuance, adjudged insufficient, or to file a new one, unless for the purpose of presenting facts which have transpired, or come to the knowledge of the party, since the filing of the first.

Appeal from the Polk District Court.

SUIT to recover the value of certain property claimed by plaintiff, and taken and sold by defendant, as constable, on an execution against one Wright. The defendant's answer was a general denial of the petition. The plaintiff applied for a continuance, and filed an affidavit for the purpose of obtaining the same. The motion was overruled. On the next day, the application was renewed, and the plaintiff was permitted to file a second affidavit, on which the motion was based. The cause for continuance set forth in both affidavits, is the absence of a witness. The second application was overruled by the court, to which plaintiff excepted; and when the cause was called, plaintiff not being ready for trial, the suit was dismissed at plaintiff's costs. From this judgment of the court, plaintiff appeals, and assigns for error, the refusal to grant a continuance, on the showing made. The contents of the affidavits for the continuance, are sufficiently stated in the opinion of the court.

Brown & Elwood, for the appellant.

Finch & Crocker, for the appellee.

STOCKTON, J.—We think there was no error in overruling the motion for a continuance. The first affidavit does not

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show that any effort had been made to procure the attendance of the witness, nor any excuse for the want of that diligence which the law requires. The second affidavit states, that the affiant had been informed that the witness was in a delicate state of health, and unable to be in attendance at the term of the court. The affidavit is made by the plaintiff's attorney, who states that he had once before tried the cause, and is as well acquainted with the facts as the plaintiff himself. He deposes that he was not advised of the inability of the witness to be in attendance at that term of the court, until so informed by the sheriff, on the previous day. No reason is given why this affidavit was not made by the plaintiff himself. In the absence of the party, there is no good reason why it may not be made by the attorney, if the interest of his client requires. It is not shown in this case, however, that the client was not present, and able to make the necessary affidavit himself. It is not competent for the attorney to swear to facts which are solely within the knowledge of his client. The second affidavit does not allege that the fact of the inability of the witness to attend the court, was not known to the plaintiff before the term, and in time to have taken her testimony by deposition. We are, for these reasons, inclined to affirm the judgment of the District Court, in overruling the motion for a continuance. A palpable case of injustice must be presented for our consideration, before we will interfere with the discretion of the inferior court, in granting or refusing a continuance.

In this instance, there is another reason why we are disinclined to interfere with its decision. The practice of suffering affidavits to be amended, or a new affidavit to be filed, when the first has not made out the case desired to be shown by the party, is one which may be productive of much evil, and which the courts should permit with great caution, if permitted at all. The party making the application has the ready means of knowing what the statute requires he should show, in order to obtain a continuance; and where the facts are, at the time, within the knowledge of the party, there is no reason why he should not be required to make out his

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afterwards, an execution accordingly issued, and as appears from the sheriff's return, a disagreement arose between the plaintiffs and W. McCormick, (one of the defendants, and owner of the property,) the said owner claiming said premises as his homestead, and therefore exempt from execution, and the said plaintiffs insisting that they did not constitute a homestead under the law. Referees were, as required by law, then selected by the sheriff, who after examining all the facts in the case, made their report to the District Court. From this report, it appears that the half lot is thirty feet wide, by one hundred and forty feet deep; that thereon is a three story building, thirty feet wide and sixty-four feet deep, which was erected in 1850, by said W. McCormick; that the lower stories were occupied by him as a place of business, until the year previous to the 10th of November, 1856; that at the time of making said report, the lower story and cellar and first floor of said building, were rented to one Nellis as a store, and occupied by him, and that the value of said premises is about eight thousand dollars. They further report, that McCormick finished the upper stories in part, and moved into them in December, 1852, and has continued to occupy the same for a dwelling from that time; that each upper story has five rooms finished, suitable for a dwelling; that for one year after the house was finished, one of the rooms on the second floor, was occupied and used as a physician's office; that for two years, another room on the same floor, was occupied and used as an attorney's office; that still a third room was occupied for about twenty-one months, by certain attorneys and bankers; and that the third story was all in one room until in 1854, and for one year immediately after the erection of the house, was occupied and used as a printing office. They further find, that the yearly rent of the cellar and first floor, is eight hundred dollars; that the second and third are occupied by said McCormick and family, and one Crabb and family, and are worth three hundred dollars a year; that there are no other buildings on said lot; that the premises have never been selected, marked out, and platted as a home-

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stead; that in 1851 and 1855, said McCormick, (his wife not joining therein), executed two several mortgages on said premises; and that in their opinion, said building was originally designed as follows, viz: "the cellar and first floor for a business house, and the second and third floors for a family residence, as now occupied." The District Court being thus possessed of the facts of the case, held that the said premises were properly claimed by said defendant, as being exempt from execution, and ordered that they be released from the levy under said writ. From this order, plaintiffs appeal.

Richman & Brother, for the appellants.

Cloud & O'Connor, for the appellee.

WRIGHT, C. J.[1]—The decision of this case involves the construction of several provisions of chapter 81 of the Code. These provisions are substantially as follows: The homestead must embrace the house used as a home by the owner thereof. It may contain one or more lots or tracts of land, with the buildings thereon, and other appurtenances; but if within a town plat, it must not exceed one half acre in extent. If when thus limited, its value is less than five hundred dollars, it may be enlarged until it reaches that value. It is not to embrace more than one dwelling-house, nor any other buildings, except such as are properly appurtenant to the homestead as such; and a shop situated thereon, and really used and occupied by the owner in the prosecution of his own ordinary business, not exceeding in value three hundred dollars, may be appurtenant to such homestead. The owner may select his own homestead, and cause it to be marked out, platted and recorded, but a failure to do this, does not leave it liable; that duty, in case of such failure by husband and wife, devolving on the officer having an execution against such owner. Where a disagree-

[1] STOCKTON, J., dissenting.

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ment arises between such owner and any person adversely interested, as to whether any land or buildings are properly a part of the homestead, such controversy is to be submitted to referees selected by the sheriff of the proper county. These referees are to examine and ascertain all the facts in the case, and report the same, with their opinion thereon, to the next term of the District Court. When sufficiently possessed of the facts, the court shall make its decision, and may direct the homestead to be marked off anew, and may take any other step in the premises, which in its discretion it may deem proper for attaining the objects of said statute.

Under these provisions, appellants claim that the half lot, with the entire building thereon erected, is subject to their execution; but if this is not true, that at least so much of said building is liable, as is not used as a home by the defendant. On the other hand, appellee insists that the entire premises constitute his homestead, within the meaning of this chapter of the Code, and are therefore exempt. We are of opinion, from the facts before us, that a portion of this property is exempt, and a portion liable to plaintiff's execution; and that, therefore, neither of the extreme grounds assumed by the respective parties, can be maintained. We think that the plain language of the Code, exempting the homestead, warrants this conclusion, and reason and justice would certainly seem to require, that it should be so. The facts reported to the District Court by the referees, do not present the case in so clear a light as could be desired, in order to arrive at a conclusion in all respects satisfactory. Such obscurity relates more particularly to the second and third stories of the building. In one part of the report, it is stated that the upper stories have been occupied by appellee as a dwelling since 1852, and yet they inform us that portions of the second and third floors were used for two or three years for other purposes; that said floors are used and occupied now by appellee and one Crabb, (but which by McCormick and which by Crabb is not shown;) and, finally, it is stated that, in the opinion of the referees, the cellar and first floor were designed "for a business house, and the sec-

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ond and third floors for a family residence, as now occupied." From this statement of the facts, we cannot say that the second and third stories are liable. It is evident that one, if not both floors, are used and occupied by appellee as a home or a residence. When an execution defendant shall use a particular building as a home, the whole of such building, in case of controversy and disagreement, will be presumed to constitute and be a part of the homestead, until it is shown by the party adversely interested, that some specific portion is not of the homestead character, and therefore not exempt. Governed by this rule, we need only say, that it does not satisfactorily appear that the second and third floors are not used by the defendant as a home; and we cannot, therefore, conclude that any portion of either is liable. The first floor and cellar, we think, are clearly liable to plaintiffs' execution. Neither from the statement of facts, nor the opinion of the referees, does it appear that these parts of the building are used as a home by the owner, nor that they are properly appurtenant to the homestead as such; nor, finally, that they are used and occupied as a shop by such owner in the prosecution of his own ordinary business; on the contrary, every such claim is expressly negatived by such report. The only reasonable ground for claiming that these portions of the building are also exempt, is to be found in the fact, that they are parts of the same house, portions of which are exempt; and the further consideration, that difficulties may arise in settling and determining the respective rights of the purchaser under the execution and the owner and occupant of the homestead.

Both of these objections, we think, may be readily answered. Under the Code, the homestead embraces the house used as a home. "To be the homestead, it must be used, and used for the purpose designed by the law, to wit: as a home, a place to abide in—a place for the family." *Charless & Blow v. Lamberson*, 1 Iowa, 435. And if under the same roof with the homestead, as thus defined, there shall be a floor or floors, room or rooms, which are not thus used, they are no more exempt than if under another roof,

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or on another and different portion of the lot. A defendant cannot, by calling a house his homestead, make it such. He cannot, by occupying or using one room in a building containing forty, exempt the entire premises. Neither can he, by using all the rooms of the second and third stories as a homestead, exempt from liability the storerooms that may be below, but which have no kind of connection with the homestead as such. What particular part of a building is, in fact, used as the homestead—as the place for the family—as the house—is, as a general thing, easily ascertained. It is such parts as are thus used in good faith, that the law designs to exempt. The parts are the “house” within the meaning of the section of the Code, which provides that “the homestead must embrace the house used as a home by the owner thereof.” But it is not to embrace all parts of a building which are not used as a home. All such parts, not thus used, are no more included within the homestead home, than if they were in different buildings. Those portions used as a home, when ascertained, are to be treated as a house, having a separate locality, disconnected from the other parts of the building. And while, as a general rule, it may be true that the term house, includes an entire building, yet within the meaning of this chapter, it is to be so construed as to carry out the object and the purpose of the law, so as to give the claimant his homestead, and not stores, shops, and rooms, which are never used by the family, or for a home, or any part of it. In our opinion, it was never the intention of the law-making power to exempt from execution an entire building or house, for whatever used, because some portion of it was used by the owner as his homestead. So long as the building shall come within the meaning of a homestead, as defined by the Code, the value of it is not limited, though the extent of the ground is. But when not within this definition, it is liable, whatever its value. And if a portion of a building shall come within this definition, and a portion not, then a portion may be exempt, and the other not. The object of the law is to protect the home and preserve it for the family, and not shops,

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stores, rooms, hotels, and office rooms, which are rented and occupied by other persons. This construction attains the object of the Code in exempting a homestead, and prevents the abuse of a law which was designed to discourage, and not to encourage fraud; and this view of the case sufficiently disposes of one position assumed by appellant, that inasmuch as appellee had made his home, or claimed his homestead, in a building, a portion of which is liable, he thereby forfeits his right to claim any part of the building as exempt. We do not think that the use made of the other portions of the building, can make that liable which would otherwise be exempt, any more than the use of a part of it as a homestead would operate to make it all, within the meaning of the law—the house used as a home; or to bring it all within the exemption.

The second objection, is one arising from a supposed inconvenience or difficulty in settling the rights of the respective owners. But why any more inconvenience than if the parties had voluntarily or by agreement thus settled their respective interests? It is not very unusual, certainly, for one person to own the soil and the first floor of a building, and another the second, and perhaps the third story of the same building. So, one may own the soil, and other parties each own the different floors; and instances have doubtlessly occurred, where the owners of the soil had leased or conveyed to another, the right to build the first story and occupy the same, and by agreement acquired the right to build on the same walls other stories, to be owned and occupied by himself. The respective rights of the parties, under such circumstances, when not controlled by contract, are easily settled by legal rules. And the same rules which obtain when the parties become voluntarily thus related, must govern when the relation is an involuntary one. We must not refer in detail to their respective rights and obligations, nor do more than to say generally, that each is to use his own, so as to do as little injury to the property of the other as possible. The title to the soil remains, in the case before us, in the defendant or owner of the homestead. The

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purchaser under the execution, acquires the right to the possession of the first floor and cellar, and every part of each, which right is to continue so long as the same is ten-antable. He may rent it, and in every respect use and enjoy it as his own property, having regard to the rights of the persons owning and occupying the remaining portion of the building. He has a right to protect his walls; to make all necessary repairs; and to all needful means of access to his said premises. The owner or occupant of the upper stories is to be in no manner disturbed in the possession of said premises; has a right to pass and repass by the ordinary and constructed passage or stairway, so as to enjoy and use said homestead; but must do nothing to endanger the property of the purchaser under the execution, nor to unnecessarily impair his rights. This is all we deem it necessary to say at present, in reference to the legal rights and obligations resulting from this somewhat unusual division of this property. Guided by these suggestions or rules, there need be no reasonable ground for future trouble or difficulty.

Judgment reversed.

STOCKTON, J., *dissenting*.—I dissent from the opinion of the majority of the court in this cause, and will briefly give my reasons for such dissent. I am of opinion that the exemption intended to be provided for by the statute, (Code, ch. 81,) whether the homestead be within or without a town plat, has reference to the soil or ground, rather than to buildings which may be erected on it. I draw this conclusion from the language of the statute, where it defines what shall be exempt as a homestead from judicial sale. In a town, it must not exceed half an acre, and may contain one or more lots, "with the buildings thereon," and must embrace "the house used as a home by the owner thereof." It must not embrace more than one dwelling-house, nor any other buildings, except such as are properly appurtenant to the homestead as such. Code, §§ 1250, 1253. I conclude from these sections, that it is the ground that is primarily intended to be exempted, and not the buildings that may

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be erected on it. The statute contemplates that the head of the family entitled to a homestead exempt from judicial sale, shall select the same, cause it to be marked off by fixed and visible monuments, and a plat of it recorded by the recorder of deeds in the Homestead Book, kept for that purpose. To this ground, so selected, platted, and marked out, the statute refers when it speaks of the "homestead." It is to embrace "the house used as a home;" it may "contain" one or more lots of ground; it must not "exceed half an acre;" it must not embrace "more than one dwelling-house," &c. The consequences to the party, who, not conforming to the provisions of the statute, seeks to have exempted as his homestead, more than half an acre, or more than one dwelling-house, or a shop or other building not appurtenant to the homestead as such, or worth more than three hundred dollars, are to be deduced from the plain language of the statute. There can be no doubt but that all such excess is subject to sale on execution, and the liability extends not merely to the building ascertained to be of the excess, but to the soil on which it stands, whether part of the exempt half acre or not. It would be a very lame conclusion to hold, that only the building was liable to sale, and that the ground on which it stood was exempt. This much, I think, is clearly provided for by the statute. But if the defendant converts to another use, a portion of the building situated on his homestead, and occupied as his home; or if, as in this case, he builds a house on his lot, intended partly as his dwelling or home, and partly as a store-house, to be used by himself, or rented out, as his circumstances or necessities may require, not only is there no express provision of law subjecting the property, or any part of it, to the creditor's demand; but, in my opinion, no such inference can fairly be drawn from the language of the statute, and no such consequence can fairly result from the facts, as that the part of the building so used as a shop, or so let out for hire to others, is subjected to the creditor's execution. It is a sufficient objection to say, that the law in such case does not so provide, and I am not for supplying its omissions or defects.

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In this case, there has been but one building—one house—erected on the lot of thirty feet front. There can, in no sense, be said to be two buildings or two tenements. The lower story is used as a store-house or shop, and the cellar is rented with it. McCormick, with his family, occupies the upper stories, or part of them, as his dwelling or home. There is no claim that the premises exceed half an acre in quantity, or that they do not embrace the house used by McCormick as a home, or that they embrace more than one dwelling-house. To hold that because he lets out the lower stories and cellar to a tenant, the part so let out becomes liable to the creditor's demand, is to my mind a less reasonable conclusion, than it would be to hold that for such reason the whole building, with the ground on which it stands, is so liable. If the party had converted his house into a boarding or lodging-house; if he had covered a half acre with an immense hotel for the entertainment of sojourners and travelers, so long as he continues his home in the building, I believe it is not claimed but that the whole building and premises would be exempt from sale on execution. Yet it is difficult to perceive, that the party who so turns his dwelling into a lodging-house or tavern, does not let it out for hire, in quite as obvious a sense, as he does who lets out the lower story and cellar for a shop or business house.

I am further of opinion, that there is no authority to be derived from chap. 81 of the Code, nor is there any rule or precedent to be found elsewhere, for subjecting part of a building, as the cellar and first story in this case, to sale on execution, and conveying a title to the purchaser; and at the same time holding that the fee simple of the soil on which the building stands, remains in the judgment debtor, as his homestead. Whoever owns the soil, owns whatever is upon it. Any cutting up of the estate, or parceling out the ownership and possession of different parts of a building to different persons, while the soil belongs to the judgment debtor, must be the result of consent and agreement, wherever it occurs. It cannot be the enforced result of compulsory proceedings on execution, by a judgment creditor against an

unwilling debtor. The law does not compel parties to make agreements; nor, in a case like this, does it make an agreement for them. That a purchaser at sheriff's sale shall become the owner of the cellar and first story of the building, while the ground on which it stands, and the second and third stories, shall belong to the judgment debtor, is an anomaly yet to be witnessed in our judicial history.

The owner may undoubtedly let out to tenants a part of his dwelling-house—different portions or apartments of the same building,—and the tenant or renter will be protected in the possession and enjoyment of his particular room or apartment, while the remainder of the building, with the soil on which it stands, shall belong to others. Such instances, however, as we have remarked, are the result of the agreement of parties, and are entered into by consent, and for a consideration. The estate cannot be cut up, so as to give to the defendant the fee simple in the soil, and to the purchaser at sheriff's sale, the fee simple in the building, or part of it. There is no precedent for so parceling out the title of the premises—for so separating the title of the house from the title of the soil on which it stands, as that whilst the defendant in execution is the owner of both, a purchaser at sheriff's sale under execution, may acquire title to the building only. If there is anything in the character of the building, or any part of it, to take from it its quality of a homestead, and render it liable to execution, the consequence must extend to the ground also on which it stands. As it is, in my opinion, the ground that is characterized and exempted as the homestead, so it must be the ground, and not the building, or part of it, which by being converted to some other purpose, loses its quality of exemption, and becomes subject to judicial sale. If the building be so constructed as to be easily divided into two tenements, and one of them is let out, either as a business-house or as a dwelling, I think there can be no question but that the separate tenement, so let out, loses its character as part of the homestead, and becomes liable in every sense—both the soil and

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the building—to the creditor's demand. The party so leasing it out, will be understood as having abandoned his claim or right to include it in his homestead. In this case, there is, however, an obvious impracticability in separating the first story and cellar from the remainder of the building, and particularly in separating the right to the different stories from the right to the soil on which they stand. If the portion of the premises made liable by the decision of the court to the creditor's execution, constituted a separate tenement, distinctly marked out, and set apart from the remainder of the homestead, in such manner as that the purchaser at sheriff's sale might acquire a fee simple title to the whole, —the soil as well as the building—the argument *ab inconvenienti* would lose much, if not all of its force. In such case, the defendant's homestead might be marked off anew, and a new plat and description made and recorded. He would then be the owner not only of the ground left to him, but of all the building by which it was covered. The inconsistency would then be obviated, of holding that a piece of ground may be called his homestead, but that he does not own the building erected on it. I give full force and effect to the consideration and argument, that it is not within the spirit of the act, that the judgment debtor should be permitted to claim exemption for his first story and cellar, let out and used for business purposes, any more than for any other building not appurtenant to his homestead, under another roof, or on another part of the same lot. If the statute, however, contains no plain and express direction to meet the present case, or if the judgment of the court is not the legitimate inference from its provisions as they stand, the argument should rather be addressed to the legislature, that make the laws, than to the courts, that can only construe them when made. As I do not think that the statute has made provision for a case like the present; and as the intention of the law-making power, in such case, is not to be gathered from the words of the act, I think it safer to wait until the legislature shall speak authoritatively, rather than for the courts to indulge in a species of judicial legis-

lation, which the facts and necessities of the case do not require.

In my opinion, the order and judgment of the District Court should be affirmed.

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Where the certificate of acknowledgment of a deed is defective, it cannot be shown by evidence *aliunde*, that everything required by statute, was done in fact, and that the officer, through mistake, omitted to certify a part; nor can the certificate be amended upon such evidence.

Under the act of January 4, 1840, entitled an act to regulate conveyances, it is essential to the validity of the acknowledgment of a deed by a *feme covert*, that the certificate of the officer taking it should show, that the contents of the deed were made known to the wife, and that she freely relinquished her right of dower in the premises.

The provisions of the statute which provide for a wife's relinquishment of dower, are a substitute for the fine and common recovery at common law, and must be substantially complied with.

Section 1230 of the Code, and the statute of Jan. 4, 1840, which provide that neither the certificate of acknowledgment of a conveyance, nor the record, nor transcript thereof, is conclusive evidence of the facts therein stated, were intended to provide for cases of fraud in obtaining the acknowledgment, or where the certificate is alleged to be false, and do not authorize an amendment of such a certificate, so as to supply defects therein.

The common law is in force in the state of Iowa.

The ordinance of 1787, for the government of the Northwest Territory, made the common law the law of that territory; that ordinance was extended over Wisconsin, and then over Iowa; and although the laws of Wisconsin and Michigan were repealed by the legislature of Iowa, in 1840, the ordinance of 1787 was *not* affected by that repeal, but remained in full force.

The ordinance of 1787, with subsequent acts, made the law of dower one of the fundamental laws of the territory of Iowa.

Where the husband alone conveys real estate, the dower of the wife, upon his death, is to be governed by the law in force at the time of making the conveyance by the husband, and not by that in force at the time of his decease.

The sixth section of the act of July 30, 1840, which provides that none of the statutes of Great Britain shall be considered as law of the territory of Iowa, does not extend to the statutes of *England*, and was intended to prescribe the event of the union of the crown of England with that of Scotland, as the period at which the statutes of England should cease to operate upon our law.

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The statute of Merton, (20 Henry. III, A. D. 1236,) which gave a dowress damages for the detention of her dower, was not deprived of any effect by section six of the act of July 30, 1840.

Under the act entitled "An act to allow and regulate the action of right," approved December 29, 1838, and under chapter 116 of the Code, damages are recoverable in an action for dower.

A dowress is entitled to recover damages for the detention of her dower, from the alienee of her husband, or his grantee, as measured by the use and profits at least, from the time of a demand of dower, provided the demand was not more than six years prior to the commencement of the suit. If the demand was more than six years before the action was commenced, she can only recover for the six years.

Where a dowress is entitled to dower in different tracts of land, the courts possess no power to order dower in all the tracts, to be assigned out of one or more parcels, without the consent of the dowress.

Appeal from the Dubuque District Court.

THIS was a bill brought to recover dower in lot sixty six in the town of Dubuque, Iowa. From the answer, it appears that Francis K. O'Ferrall, husband of complainant, being seized, conveyed the above lot by a deed of conveyance, in which she as his wife, joined. The certificate of acknowledgment is, in its form, as follows:—"This day before me, &c., appeared F. K. O'Ferrall and Jane B. O'Ferrall, his wife, both of whom are personally known to me to be the identical persons whose names are affixed to the foregoing instrument of writing, and acknowledged having signed the same for the purposes therein mentioned. And I further certify, that having examined the said Jane B. O'Ferrall, separately and apart from her husband, she acknowledged to me that she signed said instrument of writing of her own free will, and without any compulsion of her husband." This is dated Oct. 29, 1840, one day after the date of the deed. The act of Jan. 4, 1840, (Acts 1840, 35,) required the officer taking the acknowledgment, to certify, in addition to the above, that the contents of the deed were made known to the wife, and that she freely relinquished her right of dower in the premises. The defendant's answer alleges that, in fact, these things were done, and that the

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officer had omitted to certify them, through mistake; and asks that the certificate be amended according to the facts. It appears that the deceased, Francis K., conveyed not only the above lot, No. 66, but also lots No. 224, 225, and 226, (by another deed, with a precisely similar acknowledgment,) to one Harbeson, from whom by mesne conveyances they came to Michael Tiernan, who by his will, devised them all to Seth C. Tiernan and Morris Jones, the executors of his will, and who still hold the last three lots, but have conveyed No. 66 to respondent.

A suit is pending to recover complainant's dower, in the last three lots, from the executors. It is agreed on their part, that if complainant is entitled to dower in these lots, the full value of what she would be entitled to in the four lots, may be assigned to her in those numbered 224, 225, and 226, so as to save the defendant, Simplot; and defendant prays that this may be done, if she is entitled to dower. With a view to such a possible result, the District Court caused the commissioners to make various estimates, and to report upon several questions relating to the lots, both jointly and severally, so that the court might, upon further consideration, make such an assignment as should seem proper under all the circumstances, in case she should be found entitled thereto. The death of Francis K. O'Ferrall occurred in December, 1851. The plaintiff demurred to the answer, and the court sustained the demurrer, and awarded dower in lot No. 66 alone, without reference to the other lots. The defendant appeals.

Bissell & Mills, for the appellant.

Taking it for granted, that this court will examine this case, and adjudicate all the points properly raised, we will at once proceed to present those questions, in as succinct a manner as possible. The following questions arise, and are involved, in the decision of this case, and are submitted to the consideration of this court:—

1. Under the laws of Iowa, at the time the deed from O'Ferrall was made, was a widow entitled to dower in any

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of the real estate of the husband, except such as he was seized of at the time of his death?

2. Under the laws of Iowa, would the demandant be entitled to dower, if she had not joined in the conveyance with her husband at all?

3. If the law required her to join in the deed with her husband, and acknowledge the deed in a particular manner, and the certificate does not comply with the requirements of the law, then is the certificate conclusive, or can it be amended, under the laws of Iowa?

4. The court is exercising chancery powers under the present form of action; and will it not relieve the defendant against the mistake of the magistrate and fraud of the demandant?

5. If the demandant is entitled to dower, is she entitled to damages for the detention of the same?

6. If she is entitled to dower, should she not be compelled to take the same entire out of the property of the grantee of her husband? And should not the same be set off to her out of that portion still in the hands of the said grantee, before resorting to that in the hands of a purchaser of the said grantee?

1. Under the civil law, there was nothing that bore any resemblance to the common law right of dower. 2 Blackstone Com. 129.

The territory of Iowa was a part of the territory of Louisiana. It had always, up to the time of its purchase by the United States, been subject to the civil law, and the common law of England never was in force in any part of said territory. The common law was not extended over this territory by the purchase, or by the treaty entered into in connection with the purchase. The common law has never been in force in any part of the United States, except it was carried there while subject to Great Britain, or was carried there, and established by positive statutory enactment. There was never any part of the territory of Iowa subject to Great Britain, and there had never been any statute, either of the United States, or of the said territory,

at the time this conveyance was made by O'Ferrall, extending the common law over Iowa. We therefore say, that the common law was not in force in Iowa at the time O'Ferrall conveyed to Harbeson the lot in dispute. 1 Kent Com. 473 and 474, Note *a* and *b*.

2. We will next inquire what right she had in the estate of her husband. The ordinance of 1787, organizing the great Northwest Territory, provides for the descent of estates of deceased persons, "that the estates both of resident and non-resident proprietors in the said territory, dying intestate, shall descend to, and be distributed among, the children, &c., saving, in all cases, to the widow of the intestate her third part of the real estate for life, and one third part of the personal estate; and this law relative to descents and dower shall remain in full force until altered by the legislature of the district. Code, 489. This court will perceive that this ordinance provides fully for the widow; that her dower is provided for only in the estate of the husband subject to distribution; that is to say, only in the real estate owned by the husband at the time of his death. In the case now before the court, the lots on which dower is sought to be charged, were conveyed by O'Ferrall in 1840, long before his death, and his grantee took the title perfect and complete, without claim, or incumbrance, of dower; and no subsequent act of the legislature can divest him of that perfect vested right. The ordinance of 1787 provides, that this law relative to descents and dower, shall remain in full force until altered by the legislature of the district. The only law on this subject, prior to the conveyance by O'Ferrall, is that of 1839, (Laws of Iowa, 485; § 44,) which provides for the descent of the estate of deceased persons and saves to the widow, in all cases, her dower, according "to the course of the common law." This is only saving out of the estate left by the husband; and the phrase, "according to the course of the common law," only relates to the quantity and extent of the dower right, not to the property subject to the dower of the widow. Any laws on the subject, passed by either the territory of Michigan or Wisconsin, were repealed

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by the legislature of Iowa. Acts of 1840, 20. This act of 1840 also provides, in section 8, that none of the statutes of Great Britain shall be considered as law in this territory. Then, we say, if the common law was not in force in this territory at the time the conveyance was made, and the laws of Michigan and Wisconsin were not in force, then the only law giving dower was that of 1839, which only gives dower in the estate left by the husband subject to distribution; and the prayer of demandant to have dower in the land alienated by the husband, must be refused. If the court sustain this view of the case, and the law on this subject, it will be unnecessary to examine the other points, as the whole case is disposed of by a judgment in accordance with the above view of the law.

As to the second point, the defendant insists, that, previous to the death of the husband, dower is an imperfect, inchoate right, not vested; and if the court should be of the opinion, that by the ordinance of 1787, and the law of 1839, the widow would be endowed in all lands of which the husband was seized during coverture, then the following questions arise:—F. K. O'Ferrall conveyed the land in dispute in 1840, and thereby divested himself of all interest in the same,—the entire title vesting in the purchaser, subject only to the imperfect dower right of the wife. The law of 1839 was repealed in 1843—page 725—without any saving clause, thereby releasing or destroying such imperfect right, and vesting the entire title, discharged of this imperfect right, in the grantee; and no subsequent act of the legislature could divest him of that right. But grant, if you please, that the law of 1843 did not divest the widow of her right of dower, then, we say, that the Code, (page 8 and 213,) by repealing all previous laws upon the subject, and changing the nature and quantity of the widow's right entirely, has completely cut off her dower right, under any previous law or right; and the enactments of the Code upon the subject could not re-invest her with any right in land, the title to which had vested in the alienee of the husband. *Norris v. Slaughter*, 1 G. Greene, 338, as to the effect of repealing

a law. *Fenelon's Petition*, 7 Barr, 173; 5 Blackford, 195; 5 Cranch, 281; 7 Johns. 505; 4 Serg. & Rawle, 401; 2 G. Greene, 94, 181; 1 Hill, 324.

As to the 3d point, we say:—That it is not necessary for the magistrate to follow the words of the statute, in his certificate of acknowledgment. A substantial compliance with the statute is all that is required. In this case, the certificate states, that the demandant acknowledged the deed for the purposes therein mentioned, and the purpose mentioned is to convey the land free from incumbrance of every kind. Is not this a substantial compliance with the statute? In deciding upon the sufficiency of this acknowledgment, the court should take into consideration the fact, that this deed was executed in the early history of the territory; that up to August, 1840, the form used was in full conformity with the law in force; and that, at the time this deed was acknowledged, the records will show that it was the universal custom for magistrates to certify in the form used in this case; and the court should recognize such custom, unless the ends of justice absolutely require a contrary decision. 15 John. 108; 16 Ohio, 607; 1 Gil. 117; 2 Cow. 552. The Code (and by the Code the demandant makes her claim) prescribes that the widow shall have dower in the lands of the husband, to which "she had not relinquished her rights." Had she not relinquished her rights in this property? The Code does not in fact give dower; but gives a fee simple title to all lands owned by the husband, by either legal or equitable title, during coverture, to which she had not relinquished her rights, and which had not been sold on execution, &c., in lieu of dower. She joined in the acknowledgment of the deed, in the customary form, and, we say, this is a perfect relinquishment of her rights, unless that relinquishment must be in the form prescribed by the law of 1840. She had joined in conveying the same, by using all the language to convey a complete title; and had also joined in the covenants of warranty, which estops her from denying the title of the purchaser under the deed, and the property is to be treated as her separate estate. The statute of

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1840 does not say she shall not relinquish her right of dower in any other way than that prescribed by that law, to wit: acknowledgment of deed, executed by her with the form of certificate prescribed. In this case, by demurring, she admits that she did acknowledge the deed in due form of law, and that is all she was required to do, to bar her dower. 7 Mass. 291; 8 Ohio, 226; 2 G. Greene, 438; 5 Binney, 801; 6 Binney, 435. *May* does not mean *must*, in the statute of 1840. 5 John. Ch. 101; 15 John. 108; 5. Cow. 188; 1 Dallas, 15; 4 Comstock, 9. The demandant did all she could to effect the transfer of the title; (and admits that she did so,) and the law should be construed, if possible, to sustain titles. 16 Ohio, 611. A deed may be perfectly good and valid, as between the parties, if not acknowledged, and this deed, executed by her, may be good, as a relinquishment of her right, although the certificate does not follow the requirements of the law of 1840. 14 Mia. 166.

The 4th point is, that the certificate of acknowledgment is not conclusive, but may be amended. We admit that the authorities, or rather the *dicta* of judges, go so far as to say, that the certificate is conclusive, and that no testimony can be introduced to contradict, or add, to the certificate. But in those cases which have arisen between the parties to the acknowledgment, or where one of the parties in court was the acknowledging party, the certificate has not been considered and adjudged to be conclusive. In *Jackson v. Schoonmaker*, 4 John. 161, the court say, "the acknowledgment of deeds is merely for the purpose of recording them, and is not conclusive on the opposite party. The proof, or acknowledgment, is necessarily *ex parte*, and the party who is to be affected by the deed ought, at any time, to be allowed to question its validity, and the force and effect of the formal proof. To consider the certificate of the judge as conclusive on the subject, would produce manifest injustice." In *Landon v. Blythe*, 16 Penn. 582, the court directly decide that the certificate might be contradicted by parol proof. This decision was based upon the allegation, that fraud and imposition had been used in procuring the acknowledgment.

In this case, is it not a fraud for the demandant to claim her dower in property to which she had relinquished her rights with all the formalities of law, and to attempt to reap an advantage by the mistake of the officer taking the acknowledgment? The same principle is established by the cases of *Rafferty v. Fridge*, and *Moore v. Wilson*, 3 McLean, 230 and 384. The answer, in this case, alleges that it was the mistake of the magistrate, that the certificate was not in full compliance with the law. It is the peculiar province of the courts of equity to relieve against the mistakes of parties, or their agents. We need only refer to Story's Eq. Jurisprudence, § 1531, to establish this position.

There is no maxim more generally recognized by courts, than the one, that when the reason for a rule fails, the law fails. Under the common law, the existence of the wife was hardly recognized; she was, in fact, *civiliter mortua*. Her property became vested in the husband, (subject to some slight exceptions,) and the wife became legally a mere menial of the husband. Under those circumstances, it was very proper that the courts should lean to the widow, and, as far as in their power, give her all the protection possible. It was under those circumstances that the courts of Great Britain adopted the maxim, that there were three things to be particularly protected, to wit: life, liberty, and dower. The courts of the United States have never recognized the dower of the widow as equally sacred with life and liberty. The laws of the different states have, in nearly every instance, diminished the dower right of the widow, and enlarged the rights of the wife. Under our law, the wife is the absolute owner of her own estate, and has at least an equal, if not a superior, interest in the homestead of the husband. There is therefore no reason why the acts of the wife, should be treated any different than that of a *feme sole*, and the law of Iowa treats her as a *feme sole* in nearly every respect. It provides that she may convey her interest in real estate the same as any other person. There is, therefore, no reason why the courts should construe her rights with any greater liberality than any other person's rights,

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and why her acts should not be equally binding upon her as the acts of any other person.

But we are not even compelled to resort to the general principles of law, to establish the point now under discussion, that the certificate of the magistrate is not conclusive,[1] but the same may be rebutted. The Code, sec. 1230, provides, that neither the certificate, nor the record, nor the transcript thereof, is conclusive of the facts therein stated. The section, taken as it is, in connection with the preceding section, must be applied to all deeds recorded before the Code took effect, as well as those which were executed and recorded since. These two provisions, (that of 1840, and the Code,) we conceive, sets the matter at rest, as to the right to contradict and establish the facts connected with the acknowledgment, by parol proof. We do not doubt but that the proof, to authorize the courts to decide against the validity of a certificate, must be of the most direct and positive kind. We deem this point so clear as not to require an extended argument, to establish the correctness of the position we have here taken, that the certificate of acknowledgment is not conclusive. If the court agree with us on this point, they must reverse the judgment of the court below, and send this cause back for trial.

In the court below, the widow claimed damages for the detention of her dower from the time she made demand, and the court rendered judgment for the amount of damages assessed by the commissioner, to which the defendant excepted. If the common law is not in force here, then, of course, the demandant has no dower, nor damages; if the common law is in force, then, we say, although the court may decide that she have dower, the court cannot give her damages for its detention. Dower, (says Mr. Park, p. 301,) being a real action, no damages were, at the common law,

[1] The legislature of Iowa, in 1840, enacted, that neither the certificate nor the acknowledgment, or the proof of any such instrument in writing, nor the record, or transcript of the record of such instrument, shall be conclusive.

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recoverable for its detention. No damages (says Mr. Sayer, ch. 6, 23) are recoverable either at common law, or under any statute, in an action of right for dower. The only authority, in England, for the recovery of damages for the detention of dower, was by the statute of Merton. 4 Kent Com. 65. But the widow is not entitled to damages for the detention, unless the husband died seized. In several of the states, both the common law and the statutes of Great Britain, including that of Merton, have been specially adopted by legislative enactment. This is especially the case in New York and Massachusetts, and in Missouri the common law and a large number of the statutes are specially adopted. In South Carolina and Ohio, no damages are allowed in a judgment for dower. 4 Kent's Com. 65, n. c. The legislature of Iowa, as referred to before, enacted, in 1840, that none of the statutes of Great Britain were to have any force in this territory. See Laws of Iowa, 1840, Extra Session, 21, § 8; Bright's Hus. and Wife, 210, § 243. We deem this position too plain to require argument, or a reference to further authorities to sustain it. There certainly was no law in force in Iowa, either at the time O'Ferrall conveyed the lots in dispute, or at the time of his death, giving the widow damages for the detention of dower. The common law certainly, (if in force here,) never gave her damages for the detention of dower; and the statutes of Great Britain, not being in force here, we deem it too plain to admit of argument, that she cannot recover damages; and therefore the judgment of the court below must be reversed for that error.

The attorneys on the other side may endeavor to raise the question, whether, if the widow is entitled to dower, she is not entitled to one-third of the lands, in fee simple, under the Code. We say, they did not except to the judgment of the court below, and therefore they cannot raise the question here, in this court. Further than this, we say, that the widow takes the quantity of dower in accordance with the law in force at the time of the alienation, and the legislature cannot, after the title has vested in the grantee, take that title from him, and give it to the widow, or any one else.

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See 6 John. 258; *Hall v. James*, 10 Wend. 480. The opposite counsel say, that dower is a speculative right, subject to change, by the legislature. We grant, that, while the husband and wife both live, the legislature can change the dower right; but such law could only apply to lands owned at the time the law took effect, and could not have a retrospective effect, and apply to lands before that time alienated by the husband. The counsel refer to *Reynolds v. Reynolds*, 24 Wend. 193, to sustain their position. If the court will examine the case, they will see, that it proves the very reverse. In that case, the husband owned the property at the time the law was passed, and at the time he died. The court, in that case, expressly say that the statute should not have a retrospective effect, or be so construed as to take away a vested right of property, &c. Would not a decision, giving a fee simple title, take away a right vested in Simplot, by a statute passed subsequent to the time his right vested? The present bench have decided that point, in a case not yet reported, which sets the matter at rest.

One word as to the last point—that the demandant must take her entire dower out of the lots still held by M. Tiernan's estate. There is no principle better established, than that an incumbrancer must look to the property not alienated, before he can resort to that alienated, to recover the amount of his incumbrance. *Guion v. Knapp*, 6 Paige, 35. The counsel claim, that dower must be set out in each parcel separately; and in this very case *v. Tiernan's Estate*, they have procured her dower in three lots, to be set out by taking one lot entire, and part of another. M. Tiernan owned the whole four lots, subject to the incumbrance of the widow's dower. He then alienates one of the lots; then, we say, it is well established, that she must look to the part unsold for her dower, before she can resort to the alienated lands. The three lots left are more than sufficient to satisfy her dower, and the court erred in not rendering judgment in accordance with the above position. 1 Bright Husband and Wife, 367, §§ 27, 28, 29.

On the last point, we add the following authorities: 1

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Bright's Husband and Wife, 367, § 27. "If the writ directed to the sheriff command him to deliver possession of a third part of all lands and tenements, &c., and there were lands in meadow, pasture, and corn, he would act in obedience to the writ by assigning dower *in toto* out of any of these description of lands, and his return to court of having done so, would be good." Section 28 says, that "if a widow be dowable of three manors, the sheriff may assign to her one manor in lieu of dower out of all. This has been denied in an anonymous case; but Mr. Roper considers this law well established. 1 Roper Hus. and Wife, 393."

Also, see § 29, Bright's Hus. and Wife. Mr. Jacob observes: "Perhaps the authorities in favor of this mode of assigning dower would now prevail, if the manor assigned were equal in value to one third of the whole. It does not seem to be necessary in all cases, that the widow should have a third of each part of the husband's estates. Thus, if the husband be possessed of several different mines, it is not necessary that the sheriff should divide each of them, but he may assign such a number of them as may amount to one-third in value of the whole. And if one of the husband's estates had been aliened with warranty, in many cases the whole of the wife's dower was assigned out of the remaining estates, if sufficient." See, also, Bright's Hus. and Wife, 404, § 24.

Smith, McKinlay & Poor, for the appellee.

A point is made as to damages. The Code, § 2027, makes a demand necessary before damages can be claimed. This is only a declaration of a common law principle. In *Park on Dower*, 297, it is said: "So the tenant may plead that he has always been, and still is, ready to render dower; and if he plead this plea of *tout temps prist*, at the return of the summons, he may pray that the demandant may not have damages. But the demandant may reply that she requested her dower, and the tenant refused to assign it, and issue shall be taken upon that. Also, on page 303: "And even the heir himself may, as has been already noticed, save

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himself from damages, if he comes in upon the summons the first day and acknowledges the action, and pleads *tout temps prist*, i. e., avers that he was at all times ready to render dower, if it had been demanded. In what cases he may plead this plea, has been already stated. If the demandant takes issue upon it, the damages will await the event of the issue. For this reason it is that Lord Coke observes: "It is necessary for the wife, after the death of her husband, as soon as she can, to demand her dower before good testimony, for otherwise, she may by her own default, lose the value after the decease of her husband, and her damages for detaining of dower. But even where the heir pleads *tout temps prist* with success, the demandant shall recover damages from the teste of the original to the execution of the writ of inquiry." We presume it will be sufficient, under this rule of law, to say that the plea of *tout temps prist* was not plead in this case; nor is it true in fact, that the party has always been ready and willing to give the widow her dower, but, on the other hand, he has been contending precisely the contrary. If she recover at all, she must recover damages. It is alleged in the petition that a demand was made; also the time of the demand. In *O'Ferrall v. Davis*, 1 Iowa, 560, a question of damages was involved in a case quite similar to this.

Another point is made in relation to allowing the magistrate to amend his certificate of acknowledgment. This was the original main point in this case. The case of *Elliott v. Piersol*, 1 Peters, 329 and 340, involved precisely the same question. In that case, the clerk of the court undertook to amend his certificate, after the deed had been recorded. The court held it was immaterial, whether the deed was properly acknowledged in fact or not; that it must appear upon the record, and the record made at the time, and at no subsequent time, that the deed was properly acknowledged. It would be, as we conceive, the height of folly to allow a person who was a justice of the peace, some twenty years ago, to take a deed which had been recorded ten or fifteen years, and after he had been out of office as many years,

and make interlineations, amendments, and alterations. A justice of the peace cannot amend or alter his acknowledgment, after the deed has once been delivered and recorded. In *Purcell v. Goshon & Wife*, 17 Ohio, 105, a court of chancery decided that they had no power to amend the acknowledgment of a deed; much less, we say, can such amendment be made and used in a defence in a court of law.

In regard to another point made by the appellant, we make the following quotations: "A widow is not bound to take dower entire out of the whole plantation in the possession of the heirs of her deceased husband, but may recover it in parcels of the several tenants in possession." *Sip v. Sawback*, 2 Harr. 442. "In general, dower is to be assigned in the separate parcels of the husband's land, as against devisees or purchasers from the husband." *Coulter v. Holland*, 2 Harring. 330. "A widow who is entitled to dower in several different tracts of land which have been sold by her husband in his lifetime, shall not be permitted to take the whole of one tract." *Cook v. Fish*, Walker, 423. "In South Carolina, commissioners of dower cannot, without the consent of the creditors of the estate, set off to a widow one entire lot of land in lieu of one-third of each separate lot, or a sum of money in lieu of the same." *Scott v. Scott*, 1 Bay, 564.

In *Fosdick v. Gooding et al.*, 1 Greenl. 30, it is held that, "if the husband alien to two in severalty and die, the widow's dower is to be assigned out of each distinct parcel of land. So if he alien to one, and the grantee afterwards convey in separate parcels to several." "Common right gives the widow the third part of each separate parcel, messuage, or manor, by metes and bounds." "As a summary of the argument, so far as it has proceeded, it is apparent, that the prior right of dower supersedes any titles capable of being acquired to any portions of the land upon which it is a lien, subsequent to the conveyance of the fee by the husband of the first doweress, inasmuch as her right is of a postliminary character; and such other claims are merely in the *post*, while she comes in the *per*. Being in of the estate

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of her husband, it follows that she is to be endowed of an entire third part of every separate parcel, of which he was sole seized." In 3 Bacon's Ab. 214, we find: "When the husband aliens to two in severalty, or he aliens to one, and HE *aliens* one part to another or to two in severalty, the widow's dower is to be assigned out of each parcel of land." In Park's Law of Dower, 255, we find: "That an assignment of one-third in value, and not in point of quantity merely, was what was contemplated by the old law, admits of no doubt; but in the simple state of property in former times it is probable that the only provision that was made for the security of the doweress, was, by requiring that the sheriff should assign to her a third part of each existing denomination of property,—thus he was bound to assign her a third part of the arable, a third part of the meadow, and a third part of the pasture."

In the case of *O'Ferrall v. Davis*, 1 Iowa, 580, the question as to the ordinance of 1787, and all the other questions made now, were lugged into the case and insisted upon, as strongly as in this. It is perhaps sufficient to say, that no part of the ordinance of 1787 was ever in force on the west side of the Mississippi, except the articles of compact contained in the latter part of the ordinance. See Organic Law of Wisconsin, Code, 522, § 12.

WOODWARD, J.—The first question arises in the acknowledgment, as certified on the deed of Francis K. to Harbeson, and the question is, whether it may be shown by evidence *aliunde*, that everything required by statute was, in fact, done, although the magistrate has, through mistake, omitted to certify a part; and whether the certificate may not be amended upon such evidence. As a question standing upon authority, this is clearly settled by the following cases: *Elliot v. Piersol*, 1 McLean, 11; S. C., 1 Pet. 328, 338; *Jourdan v. Jourdan*, 9 S. & R. 268; *Watson's Lessee v. Baily*, 1 Binn. 470; *Barnet v. Barnet*, 15 S. & R. 73; *Jamison v. Jamison*, 3 Whart. 457; *Worthington's Lessee v. Young*, 6 Ohio, 136; *McFarland v. Febiger's Heirs*, 6 Ib.

337; *Carr v. Williams*, 10 Ib. 305; *Silliman v. Cummins*, 13 Ib. 116; *Purcell v. Goshon*, 17 Ib. 105; *Providence v. Manchester*, 5 Mass. 59; *Huyden v. Wescott*, 11 Conn. 129. And the reason of the rule is shown in the same cases.

In *Elliot v. Piersol*, 1 Pet. 338-9, the Supreme Court of the Union states the question so as to cover the present case: "The general question involved in the first instruction is, Can the privy examination and acknowledgment of a deed, by a *feme covert*, so as to convey her estate, be legally proved by parol testimony? We hold that they cannot." * * * "What the law requires to be done and appear of record, can only be done and made to appear by the record itself, or an exemplification of the record. It is perfectly immaterial whether there be an acknowledgment or privy examination in fact, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination merely, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*." The cases above cited from 1 Binney, 470, and 9 Sergeant & Rawle, 268, are much like the present one. In the latter, C. J. TILGHMANN says: "In that case, (1 Binney,) the certificate of the magistrate was defective, and, in order to supply the defect, parol evidence was offered and was refused by the court. There would be no certainty in titles, if this kind of evidence were permitted. After the lapse of twenty years, the magistrate is called upon to declare what took place at the time of the acknowledgment. The law directs the magistrate to make his certificate in writing, and he has made it. To that the world is to look, and to nothing else."

Some of the cases indicate, that the law required the officer to record the fact in his office. Perhaps this was in addition to the certificate upon the deed. But the cases in Pennsylvania, and others, show that the entering or recording it on the deed, is the same thing. The cases cited by the respondent do not controvert this doctrine. Not one of them, which we have been able to see, holds the contrary. The case of *Chessuet v. Shane*, 16 Ohio, 599, turns upon a

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relieving statute, and partly, perhaps, upon the portion of the certificate which was omitted—that is, the making the contents known. Upon principle, we should think this as important as any other part. But that this case was not understood to overrule totally the previous cases in Ohio, cited above, will probably appear from that of *Purcell v. Goshon*, 17 Ohio, 105, in which one of those cases is recognized. Or, if it does overrule them, it is upon the strength of the enabling statutes referred to. Some of the cases cited by respondent, recognize the right of the grantor to contradict the certificate. Such is that of *Jackson v. Schoonmaker*, 4 Johns. 169. This right exists, for instance, when fraud is supposed in obtaining the acknowledgment, or when the certificate is alleged to be false, and it is proposed to show that the deed never was acknowledged. And other cases may exist. And this is the meaning of section 1230 of the Code, and of the act of 1840, referred to by respondent.

But this right is not to be confounded with the claim to supply the defects of the officer's certificate, by other evidence; nor was the above section intended to open the door to the mischief which might be expected to follow the latter doctrine. See, also, *Raverty et ux. v. Fridge*, 3 McLane, 220; *Barnet v. Barnet*, 15 S. & R. 72; *Jamison v. Jamison*, 3 Wheat. 457; *Landon v. Blythe*, 16 Penn. 532; *Young v. Thompson*, 14 Ill. 380.

Let us look a moment at the former law and the statute. At common law, the wife's dower could be barred only by the formal and expensive process of fine and common recovery. The provisions of statute are a substitute for this, and there must be a substantial compliance. The above act, (1840, 35,) in section 8, provides, that "any officer taking the acknowledgment of such instrument in writing—that is, of one conveying or affecting real estate—or taking the relinquishment of the dower of a married woman, or any conveyance of the real estate of her husband, shall grant a certificate thereof, and cause such certificate to be indorsed on such instrument or conveyance." By section 20, it is enacted, that she "may relinquish her dower by any conveyance

executed by herself and husband, and acknowledged and certified in the manner hereinafter prescribed." And by section 23, the certificate of such relinquishment shall set forth, &c. This mode is instead of the fine and common recovery at common law, and clearly it must be in writing. And then the above cases, and their reasoning, apply with full force to the method prescribed by that act. We think the defects of the certificate cannot be supplied by other evidence. The authorities before referred to prove farther, that the matters omitted from the acknowledgment in the present instance, are essential to its validity; and that a court of chancery cannot extend its powers of relief so far as to amend it, by the assistance of extrinsic evidence.

The defendant suggests the further question, whether the complainant would be entitled to dower in this lot, if she had not signed the deed. And under this, he starts the query, whether the common law is the law of this state. This question has been suggested in this court before, but it has not been with apparent seriousness, and therefore it has received no formal answer; and it is not now pressed, with an appearance demanding more than a suggestive reply. In the first place, according to our recollection of history, the common law was substituted for the civil by the Missouri territory, of which this state was once a part. In the next place, so many rights and titles—so great interests have grown up, as if by and under the common law, and not by and under the civil—that it would be the duty of a court to hold that the people brought it with them. The territory has from the beginning, including all private rights and titles, been administered upon the basis of the common law, and to hold that the civil, and not the common law, is the law of this state, would produce startling and revolutionary effects. The extent and magnitude of the interests involved, would require a court to hold to the common law, if there was no other reason.

But, besides this, all our laws, back to the beginning of the territory, recognize—assume the common law. They would many of them, be unmeaning, senseless, without it. All

the proceedings of the courts would be so, and not a judgment heretofore recovered would be valid, nor a title under it. But the ordinance of 1787, for the government of the Northwest Territory, made it the law of that country; and that was extended over Wisconsin, and then the laws of Wisconsin, over Iowa. And although the statutes of Michigan and Wisconsin were repealed in 1840, the ordinance of 1787 was not affected, but remained in full vigor as before. That ordinance made the law of dower one of the fundamental laws. We will not stop to inquire in what it gave dower, for the act of January 25, 1839, (§ 44,) prescribes it, "according to the course of the common law;" and that was, that she was endowable of all the land of which the husband was seized during marriage. Thus stood the law of dower when the deed in this instance was made.

Again: respondent claims, that the law of 1839 was repealed by the act of 1848, without any saving clause; and thus, that law does not rule this cause: and then he urges that the act of 1848 was repealed by the Code in 1851, which was before the institution of this suit; and that complainant makes her claim under the Code. In the case of *O'Ferrall v. Davis*, 4 G. Greene, 358, this court held that the wife's right of dower is governed by the law in force at the time of the making of the deed, and not by that in force at the time of the husband's death. This was recognized in *Young v. Walcott*, 1 Iowa, 174. No reason for departing from that decision is yet seen. See, also, *Hitchcock v. Harrington*, 6 Ohio, 290; *Walker v. Schuyler*, 10 Wend. 480.

The defendant and appellant also makes the question, whether the doweress is entitled to damages. A demand is alleged. By the original common law, the doweress could not recover damages for the detention of her dower. This was remedied by the statute of Merton, 20 Hen. III, A. D. 1236. Under this statute it was held, that she should recover damages from the death of her husband, when he died seized; but if he did not die seized, but had aliened the land, she should recover damages from the time of making a demand only.

It becomes, in some measure important, then, to inquire what effect, if any, the statute of Merton has in this state. Experience, and the dictates of justice, produced the enactment of that statute, and they have lost none of their force in the periods which have passed since that time. It is urged that this ancient statute can have no effect here, because of the enactment of the sixth section of the act of July 30, 1840, (Special Session, 1840, chap. 29, 20,) which is, that "none of the statutes of Great Britain shall be considered as law of this territory." The enactment of this chapter, containing a repeal of the laws of Michigan and of Wisconsin, as well as the above declaration in reference to the statutes of Great Britain, was then, and has ever since been, considered of very doubtful wisdom, and of no less doubtful effect. It seemed to be taking a step in the dark. That act did not receive the approval of the governor of the territory. He was a man of age, experience, and of careful forethought, and his approval was withheld through doubts and fears of the consequences of such a step. The lawyer can readily perceive that there was much reason for hesitation. The statutes of England, from time to time, modified and meliorated the common law to a considerable extent. Some of them were necessary to deliver the nation and the law from feudal principles, and some were requisite to adapt the law to an improved state of society emerging from feudal semi-barbarism, and to suit an increasing spirit of commercial enterprise. In this view of them, these statutes were as much required by the people of America, as by those of the mother country. Many of them of a general character, and an enabling or remedial nature, have been adopted by the different states, (even by the new western ones,) either by express statute provision, or by re-enactment, or by judicial construction; the latter sometimes declaring them adopted, and sometimes considering them as become the common law of the state. Sufficient has probably been said to recall to our minds the importance of some of these acts, and the necessity that we should, in some manner, receive the benefit of the leading and most important of them. And these

remarks will justify us in saying, that we are not disposed to give to the above-named section, relating to the statutes of Great Britain, any greater effect than is necessary.

Then the question is, whether the declaration of that section extends to the statutes of England. Great Britain is not the same with England, although it includes it. The greater part, if not all, of those beneficial acts, which have been adopted into the laws of the American States, were enacted before the union with Scotland. The periods at which the English statutes have been held to cease operating upon American law, have been different in different states. Some have stopped at the fourth of James I, which was about the period of the first emigration to this country; some have fixed the epoch of our revolution; and some, if we mistake not, that of the revolution of 1688. The act of 1840 may reasonably be considered as having prescribed the event of the union of the crown of England with that of Scotland, which was nearly contemporaneous with that of the English revolution, it having taken place in the year 1707. This is more reasonable, than to regard that declaration as to the statutes of Great Britain, as synonymous with a like declaration in relation to the statutes of England, which would receive support from neither history, language, nor the principles of interpretation. We conclude, therefore, that the statute of Merton is not deprived of any effect by the foregoing declaration of the act of 1840. What force, then, is to be given to it? We have not made the foregoing remarks, in order to answer this question in the fullest extent, for of this we are relieved, as will be shown hereafter—that is, there is no necessity for deciding whether damages would now be recovered under that statute alone; but the law and the decisions, as they were held under it, are necessary to determine from whom those damages may be taken, and when, and from what time.

As to the mere question, whether damages are recoverable in an action for dower, it may be safely answered that they are, and ever have been, by our law. The act of December 29, 1838, relating to the action of right, in section

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one, declares that to be the proper remedy for recovering any interest in land ; section 56 expressly recognizes it as the appropriate action for the recovery of dower ; and section 21 gives damages, by way of the use, occupation and profits accruing within six years prior to the commencement of the action. This act continued the law until the adoption of the Code. Stat. 1843, 527. That of February 16th, 1843, was but an amendment of it, (Stat. 1843, 257) ; and that relating to the action of ejectment does not interfere with it, at least in this respect. Stat. 1843, 259. Chap. 116 of the Code relates to actions for the recovery of real property, and the enactments of that chapter apply to "any person having a valid subsisting interest in real property, and a right to the possession thereof." Section 2027 in the same chapter, recognizes it as the proceeding to recover an interest in dower, and section 2008 gives damages under the name of the use and occupation for six years prior to the commencement of the action. It is immaterial, then, under which of these statutes the widow may claim, for under both she is entitled to them. But the terms of both are very general, so much so as to apply to every kind of interest in land, and therefore it is necessary to go beyond them, to learn of whom, and from what time, they may be demanded. Can she recover them from the time of her husband's death? Our statute says, for six years only. Can she recover them from the heir and his alienee, only, or also from the husband's grantee? Our statute does not answer ; but the adjudications under the statute of Merton, inform us that she may recover against the grantee of the husband, if she has made demand, and only from the demand ; and thus we perceive that the six years of our statute must be restrained by the time of making such demand. Bright's *Hus. & Wife*, 407, §§ 32 to 47 ; 1 *Hill'd on Real Prop.* 144 to 151 ; *Sedgwick on Dam.*, 129 to 132. We learn, therefore, that the doweress is entitled to recover damages for the detention of her dower, from the alienee of her husband, or his grantee, as measured by the use and profits at least, from the time of the demand, pro-

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vided that were not more than six years prior to the commencement of the action.

Finally, the defendant claims, that the court below should have ordered the assignment of dower to be made in the three lots, for all the four. Michael Tiernan had become the owner of the four, and devised them to his executors, who conveyed No. 66 to the defendant, but still hold the first three, and an action for dower in them is now pending against the executors. These devisees consent that, if the complainant is entitled to dower in these lots, it may be assigned in the three first named, for the whole. At common law, this was done in a few instances only, and then, generally, on account of the nature of the property—as when it consisted of several mines; or on account of the inconvenience of dividing it, and setting out the dower by metes and bounds. But it was never done, it is apprehended, except when the husband died seized.

Two objections may be suggested to this course: If the widow takes one parcel instead of a third of each of three of which she is dowerable, she assumes the whole risk of the title in the parcel taken, and if she should be evicted, she has no voucher over. This consideration may not have weight in the present instance, when the title is the same to all; but in reference to a rule for general action, it has force. Another consideration of pertinency in some cases, is, that the fund or property to which the creditors of the deceased may resort—as, supposing Michael Tiernan himself had conveyed to the respondent—would be diminished by just so much as the respondent's lot is relieved. Here, again, we admit that this argument may not have particular point in the present case, for the deceased did not convey the lot, but the executors—or there may be no debts or other claims, but of this we are not informed—yet the rule adopted must apply to all. The consent of the executors would not take away the creditor's power of interference; and, moreover, although the executors consent, the great question is,—does the *doweress* consent. The court cannot compel her thus to

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take her dower, and if she is not assenting, it cannot be done. The present case shows no concurrence on her part. 1 Hilliard on Real Prop. 157, *et seq*; 1 Bright's Hus. and Wife, 367, *et seq.*, 404.

We are of the opinion that the decree of the District Court must be affirmed.

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4	405
90	540
4	406
91	146

Unless a devise to the wife by the husband, either by express words, or by necessary implication, is intended in lieu of dower, the wife will not be compelled to elect which she will take, but is entitled to both.

If it is left in doubt whether it was the testator's intention that the wife should take the devise, in addition to her dower, she will not be put to her election.

D. D., who died without issue, devised to his wife for life, two hundred and forty acres of land, and twelve hundred dollars, to build her a house, and all his household and kitchen furniture, and after other bequests, directed that at the death of his wife, the real estate devised to her, should go to the minor heirs of J. D. The widow having deceased, an action was brought by her administrator against the executor of the husband, to recover one-half of the assets of the estate of the husband, to which it was alleged, the widow was entitled. The executor answered, denying the right of the widow, to one-half of the personal estate, setting up the will of the testator and its probate, and alleging that the widow approved of the provision made by the said will for her support. To this answer, the plaintiff replied, admitting the execution of the will, and averring that the said widow rejected the provision made for her by the will, and claimed her dower; that she relinquished all rights conferred upon her by the will; and that she never at any time, approved of the provisions of the same, respecting herself. Attached to this replication, were copies of the protest made by the widow to the county court, against the provisions made for her by the will, and of her petition for the assignment of her dower. The replication was demurred to, for the following reasons: 1. That the petition to the county court for dower, was insufficient to show, that the widow elected to take dower, and relinquished her rights under the will; 2. That the protest made to the county court did not amount to a relinquishment by her, of all rights conferred upon her by the will, which demurrer was sustained by the court.

Held, 1. That there did not appear to be any such inconsistency between the widow's claim for dower, and her right to the estate devised to her by the will, as should necessarily put her to an election between them.

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2. That the court erred in sustaining the demurrer.

Section 1410 of the Code, in relation to the rights of the wife in the estate of a husband dying without issue, is intended to refer primarily to the estate of a person who dies intestate, without issue.

Where the husband dies without issue, and the estate, or part of it, is disposed of by will, the widow is not entitled to one-half of the estate.

The husband, though dying without issue, may, by his will, deprive his wife of all interest in his estate, except her dower, as allowed by law.

Appeal from the Warren District Court.

THE plaintiff claims of the defendant, the sum of four thousand dollars, which he avers is one-half of the assets of the estate of David Demaree, deceased, in the hands of defendant, his executor, to which Susan Jane Demaree, the plaintiff's intestate, was entitled, as the widow of said David, he having died without issue. The defendant denies the right of the plaintiff, to the four thousand dollars, or any other sum; denies that Susan Jane Demaree, as widow, was entitled to one-half of the personal estate of her deceased husband, and avers that D. Demaree, at his death, left a will, by which he disposed of his estate, which will has been duly proved, and admitted to record, and by which he devised certain real estate to his said widow, for her life, and bequeathed to her the sum of twelve hundred dollars; and that after the death of said testator, the said Susan Jane approved of the provision made by the said will for her support. He denies that assets to the amount charged, have come to his hands as executor, and avers that there are claims against the estate still unsettled. To this answer the plaintiff replied, admitting the execution of the will, and averring that the said Susan Jane rejected the provision made for her by the same, and claimed her dower; that she relinquished all rights conferred upon her by the will; and that she never, at any time, approved of the provisions of the same, in respect to herself. Plaintiff further avers, that the debts against the estate are all settled, and that the amount claimed is in defendant's hands as executor. Copies of the protest made by the widow, to the county court, against the provisions made for her by the will, and of her petition and

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application to said court, to have her dower set off and allotted to her, are made part of the replication, and attached thereto. To this replication, the defendant demurred, and assigned the following causes of demurrer :

1. That the petition of Susan Jane Demaree to the county court, to have her dower set off to her, is insufficient to show that she elected to take dower, and relinquished her rights under the will.

2. That her protest made to the county court against the provision made for her by the will, does not amount to a relinquishment by her, of all rights conferred upon her by the will. The demurrer was sustained by the District Court; and from this judgment the plaintiff appeals, and assigns for error, that the court sustained the demurrer to the replication.

E. W. Eastman, for the appellant.

Trimble & Baker, for the appellee.

STOCKTON, J.—David Demaree, by his will, after directing the payment of his debts, devises to his wife two hundred and forty acres of land, and bequeathed to her twelve hundred dollars, to build her a house, and all his household and kitchen furniture. He gives to his brother John, all his personal property in the state of Indiana. The remainder of his estate, personal and real, he directs to be sold, and the proceeds divided equally between the minor heirs of John Demaree, James M. Rice, and Samuel Demaree, except five hundred dollars to the American Bible Society. At the death of his wife, he directs that the real estate devised to her, shall go to the heirs of John Demaree. The defendant was appointed executor. The first question arising in the cause, is as to the sufficiency of the plaintiff's replication to defendant's answer. The District Court adjudged that this replication was insufficient, by reason of its not showing that Susan Jane Demaree, the widow, at the time of claiming her dower, had relinquished all rights conferred upon her by the will of her husband. The point made by the counsel to

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that court, was, that the relinquishment should have been executed by her, with all the formalities requisite in the conveyance of an interest in real estate. And we gather from the record, that the court was of opinion, that such a relinquishment should have been signed and executed by her, and it not being shown by the replication that this had been done, it was insufficient, and the plaintiff not entitled to bring this suit.

This ruling of the District Court was erroneous. The conclusive reason why no such relinquishment was necessary, is to be found in the fact, that there does not appear to be any such inconsistency between the widow's claim for dower, and the right to the estate devised to her by the will, as should necessarily put her to an election between them. The allowing of both to stand, does not defeat, interrupt, or disappoint the other provisions of the will. Unless a devise to the wife, to be ascertained either from express words, or by necessary implication, is intended to be in lieu of dower, she will not be compelled to elect which she will take, but is entitled to both. If it is left in doubt, whether it was the testator's intention that she should take the devise in addition to her dower, she will not be put to her election. *Corriel v. Ham*, 2 Iowa, 556; *Church v. Bell*, 2 Denio, 430; *Adsit v. Adsit*, 2 Johns. 448; *Smith v. Kinskern*, 4 Ib. 9. In this view of the case, the question whether it was necessary for the widow to have made and executed a formal relinquishment of her rights under the will, at the time of entering her protest against it, and filing her petition to have her dower assigned her; as well as the question whether such protest and petition amount to such relinquishment, in the sense in which the word is used in the statute, becomes immaterial, and it is not necessary for us to decide it. If she was entitled to the devise in addition to her dower, she was not required to make any relinquishment of her rights under the will.

This much will perhaps be sufficient to dispose of the questions arising upon the demurrer as to the necessity of a formal relinquishment by the widow. Upon another ques-

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tion which has been urged in the argument, as to the quantity of interest in the personal estate the plaintiff is entitled to recover, it may be proper for us to give our views. The plaintiff claims to be entitled to recover one-half of the personal estate of the decedent, he having died without issue. This claim is based upon section 1410 of the Code. We do not think this section applies to the present case. Taking it in connection with section 1408, we think it is intended to refer primarily to the estate of a person who dies intestate, without issue. Where the estate, or part of it, is disposed of by will, the widow is not entitled to one-half. The husband, though dying without issue, may by his will deprive his wife of all interest in his estate, except her dower, as allowed by law. If a portion of the estate remain undisposed of by will, the question whether she is entitled to any part of it, and if so, to what part, does not necessarily arise in this case, and is not decided. If no part is disposed of by will, and the husband dies without issue, one-half goes to his widow. In such case, however, she takes it by inheritance, as heir, rather than as her dower as a widow. In this case, David Demaree, by his will, disposed of all his estate. The widow was therefore entitled to but one-third of the personal estate, as her dower, after the payment of debts.

Some question is made in the argument, as to the sufficiency of the petition, and as to right of the plaintiff to bring this suit against the defendant as executor, without alleging that his accounts had been settled by the county court, and the amount remaining in his hands ascertained. The petition seems to us to be inartificially drawn, and with less distinctness of averment than we should ordinarily feel disposed to excuse. As it was not demurred to, however, and is in some degree helped out by the averment of the replication, it may be allowed to be sufficient. But as the judgment must be reversed, and the cause go back for further hearing in the District Court, we suggest that the merits of the cause, and the ends of justice, may be more satisfactorily arrived at by a replender, which we recommend to both parties.

Judgment reversed.

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 PIERSON v. DAVID *et al.*[1]

Where there are several respondents to a bill in equity, against whom the same claim to relief is made, some of whom deny the right of the complainant to the relief sought, while others allow defaults to be entered against them, the complainant is not entitled to a decree against those in default, unless he establishes his right to the relief prayed for against those who have appeared.

A complainant in Chancery is required to satisfy the chancellor that he is entitled to relief, although there has been no appearance by the respondent.

If the proof made, shows a want of equity in the complainant's case, he must fail in his suit.

P. having a "claim" or "settler's right" on a certain tract of land, on the 13th of August, 1838, by a written agreement, sold the same to W. for the consideration of \$1,500. This agreement was filed for record on the 9th of December, 1838, but was never acknowledged. C. and D. having actual notice of said agreement, in March and April, 1839, purchased the interest of W. in the land, and on the 12th of the latter month, P. on the margin of the record where said agreement was recorded, made and signed an entry of satisfaction as follows: "I hereby relinquish all my right, title, interest and claim to the within described property, for value received." The land was entered in the years, 1839, 1840 and 1841, by different individuals, and in different parcels. A portion was pre-empted in 1840, by one P. and another, at which time, P. (the complainant) as one of their witnesses, made oath, that he had no interest in said land, and that so far as he knew, there was no other claim thereon, than that set up by the pre-emptors. P. never resided on this land, and at the time of his sale to W. had a claim or claims on a section or more of government land, besides the tract in controversy. The sale to W. was made with the understanding that W. was to hold the claim for P. for an agreed consideration, and P. was to furnish the money to enter the same, and then take the conveyance from W. When P. sold to W., the claim was worth about the sum stipulated in the agreement. Several years since, a portion of the land was laid off into lots, as additions to the town of Burlington, since which, many valuable improvements have been made on it, and the premises are now worth from \$75,000 to \$100,000. P. has constantly since 1835, resided near the land, and passed over or near it, during that time, at least once each week. He has also, taken title to some of the lots so laid off on said land, from the original proprietors or their grantees, and again contracted to sell the same. W. left the county for parts unknown, soon after his sale to D. and C., insolvent, and until the last five years, P. has set up no right or claim to the premises, under his contract

[1] This cause was decided at the June term, 1856, but was overlooked at the time when the decisions of that term were prepared for the press.

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with W.—nor is any reason shown for the delay. On bill filed by P. asking a decree for the land, or that he may have a lien on the same, for the purchase money under the contract with W.; *Held*, That P. was not entitled to relief.

Appeal from the Des Moines District Court.

THIS case was before this court at the June term, 1855, on a demurrer to the complainant's bill. See 1 Iowa, 23. This demurrer was overruled, and cause remanded, with leave to defendants to plead or answer over. Since that time, complainant has amended his bill, asking that the land in controversy may be decreed to him; making other persons, (who claim the land as subsequent purchasers from the original patentees,) parties; and containing still, an alternative prayer, that if the court cannot, under the circumstances, decree him the land, he may have a judgment for what he claims is the purchase money due and unpaid; and that the same be made a lien on the premises. As shown by the former opinion, complainant commenced this suit in August, 1854, and bases his claim to this land, upon a "claim or settler's right," thereto, which he alleges he sold to one Wilson, for the sum of fifteen hundred dollars, on failing to pay which, when the land was entered, the premises were to revert to complainant. He charges that this money never has been paid, and that David and Cameron purchased this claim of Wilson, with knowledge of this contract, and for the purpose of defrauding complainant. Some of the defendants are minors, who, with most of the adult defendants, deny by their answers, each and every sustained allegation contained in the bill. Some of the defendants make default. A portion of them, also, plead the statute of limitations, and satisfaction or payment of the amount due and owing said complainant on his said contract with Wilson. The answers also deny notice of complainant's claim to this land, or of said contract, and aver that the respondents are purchasers without notice.

The material facts, as now presented by the depositions and exhibits, are as follows: The agreement between com-

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plainant and Wilson, was made August 15th, 1838, and was filed for record December 9th, of that year, but was never acknowledged. Cameron and David were the only parties who had actual notice of said agreement, before making their respective purchases. They purchased Wilson's interest in March and April, 1839, and on the 12th of the latter month, complainant, on the margin of the record where said agreement was recorded, made the following entry of satisfaction :

"I hereby relinquish all my right, title, interest and claim to the within described property, for value received. April 12th, 1839. JOHN PIERSON."

The land was entered in the years 1839, 1840 and 1841, by different individuals, in different parcels. A portion was pre-empted in 1840, by one Patterson and another, and at that time, complainant, as one of their witnesses, made oath that he had no interest in said land, or said pre-emption claim ; and that, as far as he knew, there was no other claim thereon than that set up by said pre-emptors. Complainant never resided on this claim, and at the time of his sale to Wilson, had a claim or claims on a section or more of government land, besides the tracts in controversy. It is also shown, that this sale was made with the understanding, that Wilson was to hold the claim for complainant, for an agreed consideration ; and that complainant was to furnish the money to enter the same, and then take the conveyance from Wilson. When Pierson sold to Wilson, the claim was worth about the amount stipulated to be paid in the bond. Several years since, a portion of the land was laid off into lots, as additions to the city of Burlington—many valuable improvements have been made thereon—and the premises in dispute are now worth from seventy-five to one hundred thousand dollars. Complainant has continually since 1835, resided near this land, and passed over or near it, during that time, at least once each week ; and he has himself taken title to some of the lots so laid off on said land, from the original proprietors or their grantees, and again contracted to sell the same.

The consideration paid for the discharge of said agreement by complainant, was small, but the amount thereof, by whom paid, or under what circumstances, is not shown otherwise than by the said written entry itself. Wilson left the county, for parts unknown, soon after his sale to Cameron and David, insolvent; and until the last five years, complainant has set up no right to, or claimed any lien upon, the premises, under his contract with Wilson; nor is there any reason shown for this delay. The court below found for the respondents, and dismissed complainant's bill, and he appeals.

James Green, for the appellant.

Browning & Tracy, Starr & Phelps and D. Rorer, for the appellees.

WRIGHT, C. J.—We have no hesitation in concluding, that the decree below should be affirmed. Without referring to several, not to say many grounds, on which the correctness of this decree might be sustained, it is enough to place it upon one, which we think is quite sufficient to dispose of the case. We allude to the fact, that complainant has been paid, or received satisfaction, for his interest in the claim which he sold to Wilson, and which forms the basis of his whole action. For it is obviously true, that if the consideration money has been paid, or that which is the basis of complainant's right of action, has been met or discharged, his action must fail—even though every other question involved in the case might be determined in his favor. There is no testimony throwing any doubt upon the fact, that complainant did sign this entry of satisfaction. There is no fraud or mistake of any character, shown; nor is it pretended or proved, that when signing it, he was in ignorance of his right. It stands as a simple entry of satisfaction, unexplained and unimpeached. And yet, in the face of this fact, established by the record most conclusively, we are asked, after the lapse of fifteen years, when this land

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has appreciated in value to an almost fabulous extent—after numerous *bona fide* purchasers without notice, for a valuable consideration, have acquired interests therein, and made valuable improvements thereon—and notwithstanding complainant had notice of the same, by his vicinity to the premises, and passing by and seeing the progress thereon, and after he has himself recognized the title which he now attacks, by purchasing under the same, without, as far as shown, any want of knowledge as to the true state of the title, we say, and yet, notwithstanding all these circumstances, we are asked to conclude, without evidence, that this entry was a mistake, or did not operate to discharge complainant's claim to the land, and hence cannot now defeat his action.

The counsel for appellant, however, in order to avoid the effect of this receipt, or entry of satisfaction, interposes several objections to its sufficiency. He treats it as a deed of release, and says it does not conclude complainant, because it had no *seal, witness, acknowledgment or release*. In making these objections, we think counsel entirely misconceive the nature and character of this writing or entry, so signed by Pierson, as stated when the case was formerly under consideration. Equity treats Wilson as a mortgagor, and Pierson as a mortgagee, under this instrument, and (taking the facts in the petition to be true as the matter then stood), that Pierson had a right as such equitable mortgagee, to a vendor's lien to secure the purchase money. And as an ordinary mortgage may be entered as satisfied by the mortgagee, on the margin of the record, when recorded, without the formality of a *seal, witness, acknowledgment*, or naming a *release*, so as to afterwards bind him, so may this equitable lien be so discharged. And while it is true, that by the ancient principles of the common law, a contract could only be dissolved, by the same solemnity with which it was created, yet it is also true, that as commerce and contracts have extended and multiplied, this rule, so far as the formality of a seal is concerned, has been found inconvenient, and but little regarded. Hence, at this time, if it is shown

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that a debt has been paid, a court of equity, at least, will give relief, though the acquittance may not be evidenced in accordance with the old rule. Suppose it was proved by parol, that this money was paid, either by a person who was present at the payment, or by the admission of complainant, could it be claimed that he should be allowed to again collect it? If not, it appears to us, that the case is stronger against him, where he acknowledges its receipt in writing, though such writing may not be under seal. Counsel mistake, also, when they assume that this discharge is in the nature of a conveyance or release of real estate. This bond, as in the case of mortgage, (treating the claim right in this instance, for the purposes of the requirement, as real estate), is in the *form* of a conveyance, or an instrument creating an interest therein, but, in *substance*, it is but a security for the payment of the money; and when the debt or consideration is paid, the mortgagee becomes the trustee of the mortgagor, or vendor, and the trust property is in equity discharged of the lien. *Wentz and wife v. Dehaven*, 1 Say & Ravo. 312, and authorities there cited; Powell on Mortgage, (3d ed.) 53; *Simpson v. Ammons*, 1 Binn. 177; *Martin v. Mowlin*, 2 Burr. 979. And we may, with propriety, adopt the language of the latter case, and say, it would be most injurious, and against all good conscience, if after the lapse of fifteen years, during which the subsequent purchasers have relied on this satisfaction, this complainant was allowed to recover either the land or the consideration. To allow him to do so, under the circumstances of the case, would shock all of our ideas of the duty of a chancellor, or the purposes and principles which govern courts of justice. If there was any doubt as to the execution of this receipt—or any testimony to show that it was obtained by fraud—the case would of course stand upon a different ground. We do not understand, then, that when this receipt was given, our law required anything more formal than that which the complainant adopted, and by which we are fully justified in saying, he regarded himself bound, for years afterwards, under circumstances that repel all idea that he was ignorant

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of the condition of the property, and the accruing rights of others or his own.

It is further said, however, that some of the defendants made default, and as to them it was error to dismiss complainant's bill. But it must be remembered, that complainant makes his claim against such defendants, for the same title or right that he does against those that did appear, and none other. That right he was bound to establish, so as to satisfy the chancellor that he should have relief, though there had been no appearance by any of the defendants. And though neither of the defendants had answered, if the proof made, shows a want of equity in complainant's case, he must fail in his action. We think he does not show himself entitled to the relief; on the contrary, we cannot but think that every prominent circumstance in the case, negatives his claim; and he should have no greater relief against those in default, than against those who have in fact answered.

We might place the affirmance of this decree upon other grounds, equally as satisfactory, as the one above stated. There are to our minds, several upon which the decree below might be sustained. But without extending an opinion, upon a case that we think is so entirely free from difficulty, we have deemed it only necessary to notice this one.

Decree affirmed.

SACKETT, BELCHER & CO. v. PARTRIDGE & COOK.

The facts alleged in an affidavit or petition for an attachment, cannot be controverted, and an issue raised thereon, in the principal suit.

Such issues can be made only in an action on the attachment bond.

The fact that the plaintiff has not recovered the whole of the claim for which suit was brought, affords no ground for quashing an attachment *pro tanto*.

In a suit commenced by attachment, where issue is taken on the facts alleged in the petition as a ground for the attachment, the allegations set forth in other petitions for attachments against the same defendants, and in which

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suits, judgments have been rendered by default, are not admissible in evidence, to prove the facts alleged in such petition.

Appeal from the Linn District Court.

THIS action was brought upon a bill of exchange, drawn by the defendants, for \$500, on the 16th of September, 1856, and protested, and upon an open account for goods and merchandise, sold and delivered the defendants, to the amount of \$1,128.18. The petition embraces a prayer for an attachment, based upon the allegation and affidavit, that "the defendants have property, goods, moneys, lands, choses in action, and merchandise, which they refuse to give either in payment or security of said claims."

The pleadings in their several natures, are as follows: First. There is a motion, (in substance), to quash the attachment, for want of a sufficient bond, because the attorneys who signed the name of the principal, had no authority so to do, and because the surety is a partnership, whose name was signed by one of the partners, without the knowledge and consent of the other. Secondly. A plea in abatement to a part of the cause of action, upon the alleged ground that \$1,102.42 of the account were not due when the action was commenced, the goods to that amount having been sold to defendants on a credit of four months, and the action having been brought within one month after the sale. This is accompanied by a prayer that a corresponding proportion of the goods attached, be released. Third. There is an issue taken on the affidavit for attachment. And the fourth branch of the answer is a set-off of a claim for damages on the attachment bond, for the wrongful suing out of the attachment. Issues are taken on all these pleadings and motions, without distinction. The defendant afterwards, with leave of the court, withdrew his set-off. The cause was tried by the court, who find for the plaintiff on the bill of exchange and one item of the account, and on the balance of the account, (\$1,102.42), order that "all the proceedings be quashed and abated, without prejudice."

In order to prove that the defendants had property, &c.,
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the plaintiffs were permitted to introduce in evidence, a portion of the affidavit for attachment in a suit brought by Converse, Todd & Co., against these defendants, which was before then pending in that court. The part of the affidavit so offered, was in these words: "Your petitioners further state, that the said defendants are about fraudulently to dispose of their property with intent to defraud their creditors." And also were permitted to introduce a portion, of like import, from a similar affidavit in a suit commenced by attachment, in favor of Fiske & Elliott, against the same defendants, in both of which suits a default had been entered. The defendants appeal.

Isbell, Hubbard & Stephens, for the appellants.

Whittam & Bell, for the appellees.

WOODWARD, J.—It is not the practice of this court to anticipate questions, nor to decide any, which are not made by the parties in the cause. But it sometimes occurs, that a question not made in a case, stands preliminary to those which are raised, and which it becomes necessary to dispose of, or to assume, one way or another. Thus, the question whether the averment of facts requisite to obtain an attachment, may be controverted, and an issue be taken on them in the principal suit, has an unavoidable bearing on the points raised in the present cause. This court has not recognized the doctrine, that such an issue may be made in the principal suit. Such was once the law by express provision, but that statute has long been repealed, and the general and the better opinion now is, that such issues can be made only in an action on the attachment bond. Whether it can be done by set-off, is not now determined.

It was clearly an error to admit the petitions in the other cases in evidence. As evidence, the statements are but the hearsay of a third person, as an affidavit—have but an indefinite and uncertain foundation—and in the suit in which it is filed, it does but give the right to a writ of attachment. It

proves nothing, and still less does it prove anything in another action. This is the first error assigned.

But although there be error here, it is immaterial. This was in an issue on the attachment affidavit. It constituted no part of the defence to the action, and such an issue could not be made and tried in the principal suit; neither the issue, the evidence, nor the decision upon it, affected the question of the plaintiff's recovery. But another, and a conclusive objection to the admission of this evidence is, that both the actions offered in evidence, were commenced after the present one; the one being instituted on the 21st, and the other on the 27th of October, 1856, whilst the present one was begun on the 18th of the same month.

The second error assigned, is upon the refusal of the court "to order that so much of the goods as were attached to secure the sum of \$1,102.42, which the plaintiff failed to recover, should be released from the attachment." The defendant moved that such an order be made on the rendition of the judgment, which was refused by the court. Although the court does not find for the plaintiff on that portion of his claim, yet it does not find that the action was commenced before this part of the account became due. Such may have been the case, but the court does not say so. The account is one, the items stand alike, and the court does not state why he found for the plaintiff on one item, and ordered the remainder to be quashed and abated, without prejudice. And the mere fact that the plaintiff does not recover on the whole of the claim sued, is not considered a ground for quashing the attachment *pro tanto*. Such a practice would be inconvenient, and perhaps impracticable. And again, when a cause has arrived at the period of a judgment, it is comparatively immaterial whether the attachment stands for the whole or a part only. We do not think there was error in this.

The third and last error assigned, is upon the overruling the defendant's motion in arrest of judgment. This motion was to arrest the judgment, "so far as it sustains any portion of the attachment." A motion may clearly be made to

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dissolve or set aside an attachment, but we have before indicated, that an issue cannot be taken upon it, to be tried in the main action. This motion aims at the latter state of things. For this, if for no other reason, the motion should not have been sustained, as it was not. And viewing this as a motion only, it falls under what has been said upon the second assignment. Therefore, in the opinion of this court, there was no error in the judgment of the District Court, and the same is affirmed.

MCKINNEY v. THE WESTERN STAGE COMPANY.

It is only an error in fact, committed by the District Court, in its own judgments, that can be reviewed by a writ of error *coram nobis*.

The office of the writ of error *coram nobis* is to correct a material error in fact, committed *before*, or in the presence of *us*, and not before *you*; or an error committed by the court or tribunal *from* which the writ issues, and not by one *to* which it issues.

The appellate court will presume in favor of the regularity of the proceedings of arbitrators.

Where parties submitted to arbitrators, a controversy wherein the plaintiff claimed damages for injuries resulting to his wife, by reason of the upsetting of the defendant's coach, and provided in the submission, that the award should be returned to the clerk of the District Court, and judgment entered thereon by the clerk, in vacation; and where the arbitrators made an award in favor of the plaintiff, upon which judgment was rendered by the clerk of the District Court, under the terms of the submission; and where the defendants then filed their petition for a writ of error *coram nobis*, to inquire into the regularity of the proceedings before the arbitrators, as well as the regularity of the entry of the said judgment by the clerk; and where at the next term of the said District Court, said writ, on motion of the plaintiff, was dismissed, and the judgment entered by the clerk vacated; and where the award was adopted by the court, and judgment entered thereon in favor of the plaintiff; *Held*, 1. That the writ was properly dismissed; 2. That any loss to the husband, in consequence of being deprived of the society of the wife, or being put to expense on account of the injury received by her, could be legitimately considered by the arbitrators under the terms of the submission.

At common law, for an injury to the person of the wife, during coverture, by battery, or to her character, by slander, or for any such injury, the wife must join with the husband in the suit.

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But where the injury is such that the husband receives a separate loss or damage, as if, in consequence of the battery, he has been deprived of her society, or been put to expense, he may bring a separate action in his own name. This rule of the common law upon this subject has not been changed by the Code.

Appeal from the Davis District Court.

THESE parties submitted a certain controversy, in which the plaintiff claimed damages for injuries resulting to his wife, by reason of the upsetting of the defendant's coach, to arbitrators. The submission reads as follows :

"Know all men by these presents, that whereas Solomon McKinney and the Western Stage Company, acting by their agent, O. Fuller, have this day agreed to submit the following matters in controversy between them, to the arbitration of Martin Snoddy, M. J. French, and O. D. Tisdale, to wit: McKinney claims of the said Western Stage Company, three thousand dollars damages occasioned to his wife, by reason of the upsetting of a certain passenger wagon, at Hillsborough, Iowa, on or about the 29th day of February, A. D. 1856, by reason of which certain injury was done to the collar bone and other portions of the body of said Mrs. McKinney. Now, we hereby agree and bind ourselves, that we will abide by the award of said arbitrators in the matters herein in controversy, and that their award may become a judgment of the District Court of Davis county, Iowa, after ten days from the award of the same. Said arbitrators shall take into consideration the following facts :

"1. Was any damage done to plaintiff, by reason of the upsetting of said wagon ?

"2. Is defendant liable for such damage ?

"3. What is the amount of damage to which the plaintiff is entitled, if any ?

"The above arbitrators are to be governed by the regulations of the District Court, in the investigation of this cause, and such award may become a judgment, by the entry of the clerk of said District Court of said Davis county, to be entered at any time after the same has been filed in his office

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by the arbitrators, but not to be binding as a judgment until after ten days from date. The arbitration above contemplated, to take place on the 25th day of June, at 10 o'clock A. M., in Bloomfield. Depositions may be used as evidence in said arbitration, to be taken before any officer, authorized to administer oaths, reasonable notice of not less than five days, being given of the time and place of taking the said depositions."

The award being in favor of plaintiff, and judgment rendered thereon by said clerk, defendants filed their petition for what is styled a writ of error *coram nobis*, to inquire into the regularity of the proceedings before said arbitrators, as well as the regularity of said entry of judgment by said clerk. At the next term, said writ was, on motion of plaintiff, dismissed, and the judgment so entered by the clerk, vacated. The plaintiff then moved for judgment on the award, and the defendant interposed various objections to the same. The award was adopted—judgment entered thereon in favor of plaintiff—and defendants now appeal.

M. H. Jones and Knapp & Caldwell, for the appellant, cited the following authorities: *Palmer v. Lorrillard*, 16 Johns. 343; 4 Cow. 82; 1 Wend. 56; *Gage v. Reed*, 15 Johns. 426; 5 Wend. 20; *Vosburgh v. Bane*, 14 Johns. 302; Code, § 1679; 1 Chitty on Plead. 73; 1 Bright's Husb. and Wife, 16; Van Santvoord's Plead. 128.

Trimble & Baker, for the appellee, relied upon the following: 8 Comst. 168; 5 Barb. 409; 1 New Jersey, 32; *Lewis v. Burgess*, 5 Gill, 129; *Vaughn v. Graham*, 11 Miss. 575; *Moody v. Pickard*, 8 Blackf. 58; 9 Missouri, 36; 8 B. Mon. 536; 2 Petersdorf, 135; 7 Cowen, 185; 11 Ill. 567; 1 Texas, 197; 1 Barb. Ch. 173; 1 Barb. 325; *Karthous v. Fanor*, 1 Peters, 227; 1 Hill, 489; 2 New Hamp. 179; 14 Ill. 62; *Lutz v. Linthicum*, 8 Peters, 165.

WRIGHT, C. J.—Several errors are assigned, which are not urged in the argument. We shall content ourselves

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with disposing of those thus urged. They are, *first*, that the court erred in dismissing the writ of error; and *second*, in rendering a judgment in favor of Solomon McKinney, for injuries to the person of his wife, without her being joined in the action.

So far as the writ of error sought to have the court investigate any error in fact committed by the arbitrators, it was clearly not the proper remedy. Their award was not a judgment of the District Court; and it is only an error in fact committed by that court, in its own judgments, that can be reviewed by this writ. Code, chapter 112. The office of this writ is to correct a material error in fact, committed before or in the presence of *us*, and not before *you*; or an error committed by the court or tribunal *from* which the writ issues, and not by one *to* which it issues. And in so far as this writ sought to correct the alleged error committed by the clerk, in entering judgment on the award in vacation, one sufficient reason why defendants cannot now complain of the action of the court below, is, that said judgment was set aside, and the whole matter heard, as if no such judgment had been entered. All possible prejudice resulting from such assumed irregularity, has been thus obviated, and the defendants are, therefore, in no situation to complain of such action of the clerk.

Should the wife of McKinney have been joined in this action, is the second and only remaining question presented in the argument of appellants. The agreement shows that the parties submitted to the arbitrament of three persons, the following matters: first, was any damage done to plaintiff, by reason of the upsetting of the coach or wagon of defendants; second, are defendants liable for such damage, and if so, in what amount.

We suppose that at common law, the rule is well settled, that for an injury to the person of the wife during coverture, by battery, or to her character, by slander, or for any such injury, the wife must join with the husband in the suit. When, however, the injury is such that the husband receives a separate loss or damage, as if in consequence of the battery,

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he has been deprived of her society, or been put to expense, he may bring a separate action in his own name. *Barnes and Wife v. Hurd*, 11 Mass. 59; *Lewis and Wife v. Babcock*, 18 Johns. 443; 2 Saunders P. & Ev. 568. And this rule we do not understand to be changed by the Code. It therefore follows, that in the case before us, the husband might maintain his separate action for any loss sustained by him in consequence of being deprived of the society of the wife, or being put to expense on account of the injury so received.

Such damages could be legitimately considered by the arbitrators under the terms of the submission. We will not presume, that they took into consideration, matters for which they should both have sued. On the contrary, we will presume in favor of the regularity of their proceedings, and that they only considered those matters for which the husband could sue in his own name.

Judgment affirmed.

 TRUMAN AND WIFE v. TAYLOR AND WIFE.

Words imputing to a female, a want of chastity, are actionable, without any proof of special damages.

The words are to be taken in their plain and natural import, and understood according to the sense in which they appear to have been used, and the ideas they were adapted to convey, to those to whom they were addressed.

Where in an action for speaking slanderous words, the petition alleged, that R. T., (the female plaintiff,) in the year 1852, was unmarried, and resided with her father in the state of Illinois; that in 1853, she removed with her father to this state, and in 1854, was married to her present husband; that while she resided in Illinois, she was unmarried and single; that she did not marry until after her removal to Iowa as aforesaid; and that in June, 1856, the female defendant, spoke and published of and concerning the said R. T. in the presence of certain persons, (the persons to whom said words were spoken having knowledge that said R. T. was unmarried while in said state of Illinois,) the following words: "R. T. had a child in Illinois, and it was buried, and the tale was buried with it. It (alluding to a child of the said R. T. born after marriage) is not the first one she has had. She

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had one in Illinois, and it was buried, and the tale was buried with it. You (meaning the persons in hearing) would believe it, if you were to hear Sarelda Rawlins tell it;" *Held*, That the words were actionable *per se*.

Appeal from the Davis District Court.

SLANDER. Verdict and judgment for the plaintiffs. The defendants appeal. The facts in the case, are stated in the opinion of the court.

Knapp, Caldwell & Wright, for the appellants.

Trimble & Baker, for the appellees.

WRIGHT, C. J.—The only error relied upon in this case is, that the words spoken were not actionable *per se*; and that no special damages being claimed, the verdict and judgment should have been for defendants. The petition contains two counts, and avers in substance, that the plaintiff, Rebecca Truman, in the year 1852, was unmarried and resided with her father, in the state of Illinois; that in 1853, she removed with her father to this state; and that in October, 1854, was married to her present husband, John H. Truman. It is also averred, that while the said Rebecca resided in the said state of Illinois, she was unmarried and single; that she did not marry until after her removal to Iowa as aforesaid; and that in June, 1856, the wife of defendant, spoke and published of and concerning the said Rebecca, in the presence of one Eliza J. England and others, (the persons to whom said words were spoken, having knowledge that said Rebecca was unmarried while in said state of Illinois,) the following words: "Rebecca Truman had a child in Illinois, and it was buried, and the tale was buried with it. It is not the first one she has had; (alluding to a child of said Rebecca born after marriage;) she had one in Illinois, and it was buried, and the tale was buried with it. You (meaning the persons in hearing) would believe it, if you were to hear Sarelda Rawlins tell it."

Under the ruling made, in *Dailey v. Reynolds*, 4 G. Greene,

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854, afterwards recognized as correct, in *Abrams and Wife v. Foshee and Wife*, 3 Iowa, 274, we are clearly of the opinion, that the words here charged are actionable *per se*. These words are to be taken in their plain and natural import, and are to be understood by us according to the sense in which they appear to have been used, and the ideas which they were adapted to convey to those to whom they were addressed. It is said, in *Dotland v. Patterson*, 23 Wend. 422, "that the defendant is accountable for the import of the words, as they will naturally be understood by the hearer, and explanatory circumstances known to both parties, speaker and hearer, are to be taken into account as part of the words." "The true rule," it is elsewhere said, "is, that words are to be understood in the sense which they are calculated to impress the hearer's mind." *Hays and Wife v. Hays*, 1 Humph. 402. That the persons to whom the words were spoken as charged in the declaration, understood them to impute to the said Rebecca, a want of chastity, we think there can be no doubt, and such we understand to be their plain and natural import, and especially so when we consider that they were spoken as alleged in the petition, to persons who were acquainted with the fact, that said plaintiff was single and remained unmarried during her residence in Illinois. It is suggested by appellants, that she might have been married to a man who had at the time another wife living, and that though a child born as the fruit of such marriage, might be illegitimate, yet she would not therefore be unchaste, nor could such illegitimate birth be evidence of her want of chastity. However this might be, we think it sufficient to say, that in this case, every presumption that the words were spoken with reference to any such state of case, is entirely rebutted by the explanatory circumstances, known to the hearers as well as speaker, and which circumstances are to be taken as a part of the words.

We need scarcely remark that our conclusion, that the words spoken are actionable *per se*, is not upon the ground that they import a charge of some punishable offence or crime, but upon the simple, and as we think, salutary ground,

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that words imputing to the female a want of chastity, are actionable without any proof of special damage. However much other, and perhaps a majority of states, may have hesitated in adopting this rule, in ours, at least, it may now be regarded as settled.

Judgment affirmed.

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In slander, the material inquiry is, what is the plain and natural import of the language used, and how was it understood, and what idea was it adapted to convey to those who heard it?

To say of a woman, that she had given birth to a child, without any explanatory averments, as that she was an unmarried woman, at the time of the alleged birth of the child, or that the persons to whom the words were spoken, had knowledge of that fact, or that the hearers understood the language used, as conveying a charge of bastardy, or imputed a want of chastity, are not actionable *per se*.

Where, in an action for slanderous words, the petition alleged, that "the plaintiff hitherto being, and still is, an unmarried female, of good character and standing in society, never having been guilty of any act of indecency, or deviated from the true path of chastity, the female defendant, on the 15th day of July, 1854, and on divers days since, and in the presence and hearing of divers good citizens, wickedly, falsely and maliciously, with intent to injure the reputation and standing of the plaintiff, spoke and published of and concerning the plaintiff, the false, scandalous and defamatory words following: 'She (meaning the plaintiff,) had a child in Indiana,' thereby meaning that she, the plaintiff, had been delivered of a bastard child, and was an unchaste woman," which petition was demurred to, and the demurrer sustained by the court: *Held*, That the demurrer was properly sustained.

Appeal from the Polk District Court.

SLANDER, for speaking and publishing of the plaintiff, the words following: "She had a child in Indiana." The petition was demurred to, on the ground that the words charged, were not actionable *per se*, and no special damage was alleged. The demurrer was sustained, and the plaintiff appeals.

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Samuel A. Rice, for the appellant.

The words charged accuse the plaintiff, she being unmarried, with having a bastard child in Indiana. Are these words actionable? We say they are. They charge the plaintiff with a crime under the laws of this state. Code, § 2709. They charge her with an offence under the laws of Indiana. 1 Am. Lead. Cas. 116; Stat. of Indiana, 1823, 296; *Alkorn v. Hooker*, 7 Blackf. 58; *Worth v. Butler*, 7 Ib. 251; *Shields v. Cunningham*, 7 Ib. 258.

The words charged are actionable, though they do not charge an offence against the laws of this state, but with an offence against the laws of Indiana, and committed therein. *Stout v. Wood*, 1 Blackf. 71; 1 Ib. 400; 1 Am. Lead. Cas. 122; 5 Barr, 372; 14 Johns. 233; 3 Harrington, 372. The words are actionable *per se*. *Cox et ux. v. Bunker et ux.*, Morris, 268; *Dailey v. Reynolds*, 4 G. Greene, 354; *Abrams v. Foshee and Wife*, 3 Iowa, 274; *Smith v. Silence*, ante 321; *Goodenow v. Tuppen*, 1 Ohio, 60; *Sexton v. Todd*, Wright, 371; *Wilson v. Runyon*, Wright, 651; *Malone v. Stewart*, 15 Ohio, 319.

J. M. Elwood, for the appellees.

1. Words imputing want of chastity are not actionable at common law. *Brooker v. Coffin*, 5 Johns. 188; *Graham's Practice*, 2d ed., 86; *Chase v. Whitlock*, 3 Hill, 139; 2 Starkie's Evidence, 9; *Buys v. Gillespie*, 2 Johns. 115; *Bradt v. Towsley*, 13 Wend. 253; *Olmstead v. Miller*, 1 Wend. 507; *Elliott v. Ailesberry*, 2 Bibb, 473; *McGee v. Wilson*, Littel's Selected Cases, 188; *Burtch v. Nickerson*, 1 American Lead. Cases, 107; *Beach v. Ranney*, 2 Hill, (N. Y.) 309; *Stout v. Wood*, 1 Blackford, 71.

2. The words impute no offence, under section 2709 of the Code. That only punishes cohabitation—cohabitation being of the essence of the offence. Webster defines the term cohabit to mean: "*To dwell or live together as husband and wife usually, or often applied to persons not legally married.*"

3. The words charged impute bastardy in the state of Indiana, and the petition should allege that the words im-

Wilson v. Beighler and wife.

pute a crime in the state of Indiana. Without this allegation, the petition is clearly demurrable. *Stout v. Wood*, 1 Blackford, 71.

4. The demurrer clearly reaches this question. The words, as alleged, do not impute a crime, nor allege any special damage. The petition must state every material fact which the plaintiff would be bound to prove in order to recover. She would be bound to prove that by the laws of Indiana, the words spoken of her imputed a crime; and she is equally bound to allege that it was a crime by the statutes of that state.

WRIGHT, C. J.—The petition does not allege special damages resulting from the speaking of the words by defendants, and the only question made is, are those charged, actionable *per se*? The petition avers "that the plaintiff hitherto being, and is still, an unmarried female of good character and standing in society, never having been guilty of any act of indecency, or deviated from the true path of chastity, the defendant, Magdalena Beighler, to wit, on the 15th day of July, 1854, and on divers days since, and in the presence and hearing of divers good citizens, wickedly, falsely and maliciously, with intent to injure the reputation and standing of the plaintiff, spoke and published of and concerning the plaintiff, these false, scandalous and defamatory words following: 'she (meaning the plaintiff,) had a child in Indiana,' thereby meaning that she, the plaintiff, had been delivered of a bastard child, and was an unchaste woman."

Assuming that under proper averments the words charged would be actionable, we are nevertheless of the opinion that the demurrer in this case was properly sustained. The material inquiry is, what is the plain and natural import of the language used by the defendants, and how was it understood, and what idea was it adapted to convey to those who heard it? *Truman and Wife v. Taylor and Wife*, ante, 424. To this there can be but one answer, and that is, that the plaintiff had given birth to a child, a charge which of itself, unaided by any explanatory circumstances, would scarcely be action-

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able, as imputing a want of chastity. To give the words an actionable meaning, and an import other and different from the plain and natural one, it should appear not only that the plaintiff was unmarried at the time of the alleged birth of the child, but also that the persons to whom the words were addressed had knowledge of that fact, or at least there should be some averments showing that the hearers understood that the language used, conveyed a charge of bastardy, or imputed a want of chastity to plaintiff. This is not done in this petition, and in this it differs in an essential particular from the case of *Truman v. Taylor*, *supra*. We need hardly say that the allegation that defendant meant by the language used to charge the plaintiff with having had a bastard child, cannot enlarge the sense or meaning of the words.

Judgment affirmed.

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Where there is a motion for a new trial upon some ground which brings up the evidence, the appellate court looks into that evidence upon such motion; but it cannot review the finding of the court below, or of a jury, simply as a verdict, on errors assigned thereon.

The owning of intoxicating liquors in this state, in a state of transportation, is not unlawful; nor are such liquors a nuisance, which any one may abate, by destroying them.

A set-off is not a defence to an action, and should be pleaded separately.

A contract for the transportation of intoxicating liquors, is not void *per se*, under the act for the suppression of intemperance, approved January 23, 1855.

Where a party was sued as a common carrier, for so negligently and carelessly performing his contract to carry a demijohn, containing six gallons of brandy, from B. to O. that the same was lost and destroyed; and where the defendant in his answer, denied the contract, and averred that it was void; that plaintiffs sent a letter, by his teamster, for some articles; that he did not know what they were; and that if the plaintiffs sent for brandy by his teamster, he is not liable. *Held*, 1. That the answer amounted only to the general issue; 2. That the answer set up no fact, making the contract void.

Appeal from the Mahaska District Court.

THE plaintiffs sued the defendant as a common carrier, for so negligently and carelessly performing his undertaking to carry a demijohn, containing six gallons of brandy, from Burlington to Oskaloosa, in Iowa, that the same was lost and destroyed. The defendant filed his answer, denying the carrying, and the contract to carry; and averring that it was void under the law; that he did not know there was brandy on his wagon; that he never agreed to haul brandy in a demijohn, from Burlington to Oskaloosa, for the plaintiffs; that plaintiffs sent a letter by his teamster for some articles; that defendant did not know what they were; that if they sent for brandy by his teamster, he is not liable, as he did not, and would not have permitted the same to have been carried in his wagon; and that he never had a demijohn of brandy of six gallons, worth forty dollars, of plaintiffs', in his wagon, nor any brandy or demijohn of any price, for plaintiffs whatever, but plaintiffs are indebted to defendant in the sum of fifty dollars, for keeping horses, &c. In the District Court, the cause was tried by the court, and the matters found were reduced to writing, under § 1793 of the Code; and that court found as follows: That on the 25th of July, 1855, H. E. Hunt & Co., of Burlington, Iowa, delivered to Griffie, the servant and teamster of defendant, one box of merchandise, containing one demijohn, with five gallons of brandy, worth four dollars per gallon; that the demijohn and box were worth one dollar and fifty cents; that said box was in good order and properly packed, when delivered; that at the time of delivery, defendant was present, and directed the delivery to said Griffie, as his teamster; that but one and a half gallons of said brandy were delivered to plaintiff, which was worth six dollars; and that the demijohn, box, and the remainder of the brandy, were destroyed on the road from Burlington to Oskaloosa, and were of the value of \$15.50. Finally, the court found for the plaintiffs \$15.50, and costs. The defendant appeals from the judgment rendered on this finding.

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Crookham & Fisher, for the appellant.

Wm. Loughridge, for the appellees.

WOODWARD, J.—The defence is based upon an assumed construction of the act for the suppression of intemperance, of January 22d, 1855. Statute 1855, 58. This act provides that the keeping of intoxicating liquor, with intent on the part of the owner, to sell the same within this state, contrary to the provisions of this act, is prohibited, and the intoxicating liquor so kept, is declared a nuisance. But under the same act, such liquors might be sold by authorized agents, for medicinal, mechanical, and sacramental purposes, and they might be manufactured in the state, for the purpose of being sold according to the provisions of the act. Section seven provides that upon the trial of an indictment or information under the act, the finding the liquor named in the proceeding, in the possession of the accused, in any place, except in his private dwelling-house, or its dependencies, is taken as presumptive evidence that it is kept or held for sale, contrary to the provisions of the act.

The assignment of errors next requires attention. The second is, that the court erred in finding the value of the brandy at \$15.50; the third, in finding it of any value; the fourth, in finding that Bowen and King were not partners at the time defendant alleges that he kept horses for them. (This relates to the set-off.) These assignments refer to the finding of the facts by the court. This is not within our province to examine, in the present cause. When there is a motion for a new trial, upon some ground which brings up the evidence, then this court looks into that evidence upon such motion. But it cannot review the finding of the court or of a jury, simply as a verdict, and on errors assigned thereon.

The other errors assigned, are: 1. In holding that plaintiffs could maintain the action for the brandy, that being declared a nuisance by statute; 2. In holding that the owning brandy in the state of Iowa by the plaintiffs, as they did,

was a lawful ownership; and that they could maintain an action for the negligent transportation of the same. These matters come within the province of this court to examine, under the actual state of the pleadings. The defendant is sued as a common carrier, for so negligently executing his undertaking to transport the brandy, that the greater part was in some manner wasted, consumed, or lost. No question, is made on either side, upon the minutiae of the pleadings. The answer of the defendant amounts to a denial of the petition—to the general issue only; and the court finds the facts to be, that defendant did undertake to carry; that the greater part of the property was lost; and that the part so lost or wasted was worth \$15.50, and finds a verdict for that amount for the plaintiff. The question then recurs, and the defendant's position assumes, that the bare fact of owning intoxicating liquor in the state of Iowa, in a course of transportation, as this was, was unlawful; that the brandy was a nuisance, and that any one finding it, might abate the nuisance, by destroying the brandy. It is possible, under the above act, to own and to possess intoxicating liquor lawfully, in this state. The plaintiffs may have caused it to be brought from without the state, or may have bought it of an authorized agent in Burlington, where the carrier received it. They may have intended it for their own cellars, which they might lawfully do, or for medicinal or mechanical purposes. This being so, are the plaintiffs bound, as against the defendant, to show the lawfulness of their ownership; and had he the right to presume everything against such lawfulness, or must he show them to be in the wrong? The presumptions allowed by the statute, are somewhat stringent. Section seven, before recited, makes a presumption against the owner having it in his possession, in any place except his private dwelling-house. It has not been decided whether his possession by a bailee, like the present carrier, would bring him within the law; but it is probable that such presumption could not arise while the goods were *in transitu*, nor until they had arrived at a state of rest, for until

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then, it could not be known that they would be in a position to which the statute presumption would attach.

Then, it is to be observed, that the above presumption, under the statute, is made upon the trial of an indictment or information, and the statute goes no farther. And it may be doubted, whether the defendant has a right to make that presumption *in pais*; and it becomes a question, whether this is such a nuisance as can be abated by any one, at his election. One thing, at least, seems manifest, as the plaintiffs could lawfully possess brandy in this state, if the defendant has undertaken to abate it as a nuisance, the burden is on him to show that it existed under such circumstances as to constitute it a nuisance. He must plead and show the requisite facts. This he has not done. His answer really amounts only to a denial of the undertaking to carry, but he has thrown into it some allegations that the contract to carry was void; yet he has shown no fact or circumstance making it void under the law.

The court found that the set-off was against one only of the plaintiffs, and thereupon held that it could not be pleaded against the two. We would take this occasion to make a remark upon the manner of pleading in set-off. Counsel will bear in mind, that a set-off is not a defence to an action; and, therefore, it is not to be confounded with the defence, but should be pleaded separately.

There is no error in the rendition of the judgment by the District Court, and the same is affirmed.

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CROW, MCCREARY & CO. v. VANCE.

The assignment of a promissory note, secured by mortgage, carries the mortgage with it; and the assignee may maintain an action upon the mortgage in his own name to enforce the lien.

The right of the mortgagee is a mere chattel interest, inseparable from the debt it is intended to secure, and transferable by a mere assignment of the debt, without deed or writing.

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By the assignment of the debt, the assignee is entitled to use all the remedies the assignor might have used, to enforce the lien of the mortgage against the debtor.

Previous to the year 1849, V. sold to B., a tract of land, on which to erect a mill, and to secure the sum of \$800, due on the land, executed a deed of trust to V., under which the land was subsequently sold, and purchased by V. On the 16th of July, 1849, B. being indebted to R., for money paid by R., for the purpose of building a mill and other improvements on the land, executed a note to R. for \$325, payable in one year, and secured the same by a mortgage on the land bought of V., and also agreed that R. should hold a lien on the land, for all money, goods, materials and labor, furnished or paid by him, towards the erection of the buildings or mill dam. On the 2d of May, 1850, V. executes to R. an instrument in writing, to the effect, that "V. agrees that R. shall hold a lien for all moneys, materials and labor, paid for by said R., for building a mill or other improvements on said land, and said R. agrees to furnish B., on their agreement, such things as their contract calls for, to build said mill, which writing was signed by V., but not by R. When the land was sold under the trust deed, is not shown. In November, 1850, R. assigned the note, and delivered the mortgage from B. to the plaintiffs, and also delivered to them the agreement of V. On a bill filed by the plaintiffs, against B. and V., praying a foreclosure and sale as to the land, which shall postpone to the claim and lien of the plaintiffs, any interest of V. in the premises;

- Held*, 1. That the agreement of V. with R., dated May 2, 1850, was an undertaking on the part of V., to give to R., a lien on the land, for all money, labor, or materials advanced by R., for the purpose of building the mill and other improvements on the land, before as well as subsequent to the date of the agreement, and included the sum for which the note of B. was executed.
2. That the court erred in excluding the agreement of V. from the jury.
3. That the plaintiffs, by virtue of the assignment of the note and mortgage of B., acquired the right, under the agreement of V., dated May 2, 1850, to a decree against V. postponing any claim he might hold against B. and the land, to the claim and lien held by the plaintiffs.
4. That the agreement of V. to give R. a lien, imparted a quality to the debt of B. to R., which passed to the plaintiffs with the assignment of the note.

Appeal from the Des Moines District Court.

FORECLOSURE of a mortgage. The defendant, H. M. Vance, previous to the year 1849, had sold to Peter Brewer, a tract of land on Skunk river, in Des Moines county, on which to erect a mill, and to secure the payment of \$800 of the purchase money, received from Brewer a trust deed of the premises. On the 16th July, 1849, Brewer being indebted to B. F. Roe, in the sum of \$325.50, gave his note for

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that amount, payable in one year, and to secure the payment of the same, gave Roe a mortgage on the land bought by him of Vance. By an instrument of writing of the same date, executed by Brewer to Roe, it appears that the money for which the note was given, was paid by Roe to Brewer, for the purpose of building a mill and other improvements on the land; and that Brewer further agreed, that Roe should hold a lien on the land for all moneys, goods, materials, and labor furnished or paid for by him towards the erection of the buildings or mill dam. On the 2d of May, 1850, Vance, the defendant, executed to Roe an instrument of writing, to the effect, that "Vance agrees that B. F. Roe shall hold a lien for all moneys, materials and labor paid for by said Roe, for building a mill and other improvements on the land, that I, the said Vance, sold to Peter Brewer to build said mill on." It is further set forth in the writing, that "said Roe agrees to furnish said Brewer, on their agreement, such things as their contract calls for, to build said mill." This writing is signed by Vance but not by Roe.

In November, 1850, Roe assigned the note and mortgage of Brewer to the plaintiffs, who bring suit thereon, making Brewer and Vance, defendants, praying judgment against Brewer for the amount of the note and interest, and a decree of foreclosure and sale as to the land, which shall postpone to the claim and lien of the plaintiffs, any interest of Vance in the premises. The petitioners aver, that the note was given by Brewer for money paid, and for materials and labor furnished, by Roe, in erecting the mill and other improvements on said tract of land. The defendants were required to answer under oath. Brewer answered, denying any indebtedness to plaintiffs. Vance answered, admitting that he had agreed that Roe should hold a lien on the land, provided he would furnish materials for the completion of the mill. He denies that Roe furnished the materials or finished the mill. He denies that he consented that Roe should hold a lien on the land for the amount of the note sued on; and avers that the writing signed by him, and delivered to Roe, was intended by him to cover only advances

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to be made by Roe, subsequent to its date, and not to cover any prior advances; and that it had no reference to the debt or mortgage now sued and sought to be foreclosed. Issue was joined on the answer of the defendants, and on the trial, the plaintiffs, having proved the execution of the agreement signed by Vance, offered the same in evidence. Objection being made, and questions raised as to the effect of the agreement, upon the right of the plaintiff to the relief prayed for against Vance, the court held, that the agreement was not an undertaking on the part of Vance, to give to Roe a lien for the payment of the note, but only for such money, labor and material, as should be furnished by Roe to Brewer to build the mill, subsequent to the date of the agreement. The court further held, that it was not such a security as passed to the plaintiffs, by the assignment of the note, so that they could have the benefit of it in this action against Vance. The plaintiffs then offered to introduce evidence, to show that the instrument of writing signed by Vance, was intended to cover the money due by the note, as well as all future advances, and that said advances had been made by Roe, in pursuance of said agreement. The defendant objected to the introduction of this evidence, and the objection was sustained, and the evidence excluded. A verdict was returned for the defendant, and a decree rendered denying to plaintiffs the relief prayed for against Vance.

The plaintiffs appeal. The other material facts will be found in the opinion of the court.

D. Rorer and J. C. Hall, for the appellants.

Browning & Tracy, for the appellee.

STOCKTON, J.—The first assignment of error, is upon the ruling of the District Court, excluding from the jury the written instrument executed by Vance to Roe, on the ground that it was not an undertaking on the part of Vance, to give to Roe a lien on the land for the payment of the money due on the note, but only for such money, labor and materials as should be furnished by him, to build the mill, subse-

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quent to the date of the agreement. We can give no other construction to this agreement of Vance, than such as shall apply its meaning to all money, labor, or materials advanced by Roe, for the purposes contemplated by the parties, before as well as subsequent to its execution. The language used, is certainly broad enough to comprehend both. Vance agrees that Roe shall hold a lien upon the land, for all money, labor and materials, paid for by Roe, for building the mill and other improvements on the land sold by Vance to Brewer. There is no rule of interpretation known to us, which will restrict the application of this language to subsequent, rather than to prior, advancements. It appears to us more reasonable to limit its operation to the past, than to confine it solely to the future. The language is, "money, materials and labor *paid for* by Roe;" and not such as he is yet *to pay for*, or advance.

The second assignment of error, is upon the refusal of the court, to suffer evidence to be introduced, to show that the instrument of writing was intended by the parties to cover the amount due on the note, as well as future advances to be made by Roe. As we are of opinion that the court erred in its construction of the instrument of writing, it will not be necessary to notice the question raised by the second assignment of error, further than to say, that, as by our construction of the instrument, it expressly extends to any advances previously made by Roe, to Brewer, for building the mill, the plaintiff need not prove *aliunde*, that such was the intention of the parties.

We next inquire, whether, by the assignment of the note and mortgage of Brewer to plaintiffs, they acquired any right, under the agreement of Vance, dated May 2d, 1850, to a decree, in this suit, against Vance, postponing any claim or lien he might hold against Brewer or the land, to the claim or lien held by plaintiffs. In other words, is their lien upon the land prior to that of Vance, by virtue of the assignment of the latter with Roe? It does not very distinctly appear what interest in or claim upon the land, was retained by Vance after his sale to Brewer. By the answer

of Vance, it is alleged, that Brewer owed him eight hundred dollars, a balance of the purchase money unpaid; that the land was sold under a deed of trust, executed by Brewer and wife, to secure the payment of this balance; and that the title under the sale passed to Vance. At what time this sale was made, is nowhere stated. As the answer of Vance, as to the amount due to him from Brewer, for which he retained a lien, is not denied, we presume it will be safe for us to assume, that the lien retained by Vance for this unpaid balance of the purchase money, was the extent of his interest in the land; and that his lien upon it, for this amount, was prior in point of time, to that accruing to Roe, under the mortgage from Brewer. The agreement between Vance and Roe, in order that it may have its true effect and meaning, must receive its construction with reference to the state of facts existing between the parties, Brewer, Roe and Vance. The latter had sold and conveyed to Brewer, the land on which to erect the mill, retaining a lien upon the same for eight hundred dollars, a balance of the purchase money. Brewer, anxious to complete the erection of the mill, sought the assistance of Roe, who agreed to furnish money, labor and materials for its construction. Having advanced \$325.50, to secure the payment of which to him, the note and mortgage were executed by Brewer, he was unwilling to furnish any further means, until he could be assured that the lien of his mortgage upon the property, should have priority over that held by Vance, under his deed of trust. In this state of affairs, the instrument of writing, set forth in the pleadings, and upon which the controversy in this cause has arisen, is signed by Vance, and delivered to Roe. By it, he agrees that Roe shall hold a lien for all moneys, materials and labor, furnished or paid for by him, for building the mill or other improvements on the land. We have said that this agreement of Vance, in its grammatical construction, refers more reasonably to advances already made, than to those he might thereafter make to Brewer. Taking the language cited, however, in connection with the subsequent part of

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the agreement, where it is provided that "Roe agrees to furnish Brewer such things to build the mill, as their contract calls for;" we think it was intended to give a lien for all advances made by Roe, whether before or after the date of agreement.

But what lien is it, that Roe is "to hold?" Why is the consent of Vance necessary to the consummation of any lien that Brewer may wish to give to Roe on the land? The meaning evidently is, that Vance consents that Roe shall hold a lien upon the premises, under the mortgage of Brewer, prior to, and better than that of Vance, under his deed of trust. Any other construction would take from the language of the agreement, all its meaning, and render it a nullity. The objection of the want of consideration for the agreement of Vance, we pass by, with the remark, that if it were necessary that such consideration should be shown, it may be found in the fact, that the means furnished by Roe were expended in erecting the mill, and in other improvements, upon the land, to which the defendant's lien attached, enhancing its value, and thereby increasing his security. And this same land was afterwards sold, and the title to it acquired by defendant, under the deed of trust given to secure to him the payment of his \$800; the unpaid balance of the purchase money—whereby he has got back his land, with all the improvements put upon it by Brewer. The fact that these improvements were made, and this enhanced value given to the land, with the money and means furnished by Roe, is surely a sufficient reason and consideration for the agreement of Vance, to give priority to the lien of Roe's mortgage.

We next inquire as to the effect of the assignment of the note to the plaintiffs, and whether such assignment carried with it, as a necessary incident, a lien upon the land, superior to that of Vance, and such as rendered Vance's interest in the land, liable to foreclosure and sale, to satisfy the debt. It is a settled doctrine in equity, that the assignment of a promissory note, secured by mortgage, carries the mortgage with it; and the assignee may maintain an action upon it in

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his own name, to enforce the lien. Mortgages are not now considered as conveyances of land, within the statute of frauds. The right of the mortgagee is a mere chattel interest, inseparable from the debt it is intended to secure, and transferable by a mere assignment of the debt, without deed or writing. The debt is the principal thing. The right of the mortgagee in the land, is an incident attached to the debt, and ceasing when the debt is discharged. *Green v. Hart*, 1 Johnson, 590; *Southern v. Mendum*, 5 N. H. 420, 432; *Rigney v. Lovejoy*, 13 Ib. 247; *Burdett v. Clay*, 8 B. Monroe, 294; *Dick v. Maury*, 9 Sm. & Mar. 448; *Henderson v. Herrod*, 10 Ib. 633. This doctrine rests upon the well established principles of courts of equity, which, under circumstances closely analogous, entitle a surety who pays the debt, to every remedy which the creditor has against the principal debtor; to enforce every security, and all means of payment; to stand in the place of the creditor; to have all securities transferred to him; and to avail himself of them against the debtor. This right is stated as depending, rather upon a principle of equity and natural justice, than upon contract. *Craythorne v. Swineburne*, 14 Vesey, 160; *Hayes v. Ward*, 4 Johns. 123; *Matthews v. Aiken*, 1 Comstock, 595; *Clawson v. Morris*, 10 Johnson, 524. So, on the same equitable principles, it has been held, that the creditor is entitled to the benefit of the securities taken by a surety from his principal, for his own indemnity. The creditor may have them applied in discharge of his debt. *Dick v. Maury*, 9 Sm. & Mar. 448; *Bank of Auburn v. Throop*, 18 Johnson, 505; *Waring, ex parte*, 19 Vesey, 345; *Curtiss v. Tyler*, 9 Paige, 431. So, as a general rule, sureties are entitled to the benefit of all securities which may have been taken by any one of them, to indemnify himself against their joint liabilities for their principal. The security taken by one, enures to the benefit of all. *Elwood v. Deifondorf*, 5 Barbour, 398. In the present case the mortgage, as well as the note, was assigned to the plaintiffs. There can be no question, but that all the rights of Roe to the debt, and all

his lien under the mortgage from Brewer, to secure the payment of the debt, passed to plaintiffs by the assignment.

Whether the assignment carried with it, also, the right which Roe obtained, by the agreement of Vance, to the prior lien on the land, is a more difficult question. This agreement was not transferred to plaintiffs by indorsement. It is in their possession, however, and it is assumed that it came there lawfully, at the time of the assignment of the note and mortgage by Roe. By the assignment of the debt, the assignee is entitled to use all the remedies, the assignor might have used, to enforce the lien of the mortgage against the debtor. Does his right extend further and may he enforce a lien which the assignor held against another person? Although the agreement executed by Vance, is not assigned by Roe, there seems to have been an obvious intention on his part, to transfer to the plaintiffs, the note he held against Brewer, with all its qualities and incidents, and to clothe them with all the rights to collect it, and to enforce all the liens given to secure its payment, that he possessed himself. The priority accorded to Roe's mortgage, by the agreement of Vance, was in the nature of an additional security acquired by him, which continued an incident of the debt, after it passed from his hands by assignment. Vance did not become surety for Brewer, nor did he guaranty the payment of his note to Roe. Holding a deed of trust upon the land, he does, however, agree to waive his lien, and postpone its admitted priority in favor of Roe.

We do not see why this agreement of Vance, should not be held, upon the well established principles of equity, to impart a quality to the debt which passed to plaintiffs by the assignment, and which entitles them, in this suit, to a decree postponing the lien of Vance to theirs, and subjecting his interest in the land, so far as the same may be necessary to the payment of their claim against Brewer. We have not been cited by counsel, to any other authority to this question, nor in the consideration we have given to the cause, have we met with any that can be deemed directly

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in point. The case of *Curtiss v. Tyler*, 6 Paige, 431, is, however, so nearly analogous, that we may receive it as authority for our judgment in this case. It was there ruled by WALWORTH, Chancellor, that the assignor of a bond and mortgage, will be held, on a principle of equity, to be a surety for their payment, in such a sense, that any collateral security held by him for the payment of the debt, will enure to the benefit of the holder of the bond and mortgage; and on a bill filed to foreclose the mortgage, in which the party giving such collateral security, was made a party for the purpose of obtaining a decree over against him, in case of any deficiency upon a sale of the mortgaged premises, and in case such deficiency could not be collected from the mortgagor; on demurrer by the collateral guarantor, it was held that the complainant was entitled to the decree prayed for against him.

Upon principle and authority, then, we are of opinion that the plaintiffs are entitled to the relief prayed for against Vance. And the judgment of the District Court will be reversed, and the cause remanded, with directions to that court to award a new trial upon the issue joined with Vance, and for other proceedings not inconsistent with this opinion.

Judgment reversed.

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A warrant of arrest in a criminal case, which follows substantially the form given in the Code, is legally sufficient.

An information that follows the statute in every essential requisite, is sufficient.

Where the caption and a part of the first count of an information, read as follows:

"*The State of Iowa v. John Devine.* Before William C. Smith, Justice of the Peace, in and for the county of Benton: The defendant is accused of the crime of selling intoxicating liquors, contrary to law. 1. For that the defendant, on the 28th day of January, A. D. 1857, by himself for himself, in Vinton, county and state aforesaid;" and where the sixth count, (on

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which defendant was convicted,) averred, "that said defendant on the 29th day of January, A. D. 1857, at the place aforesaid," &c.; *Held*, That the venue was sufficiently laid in the information.

Where an information was subscribed and sworn to as follows: "The state of Iowa, Benton county:—I, James L. Pauly, being duly sworn, depose and say, that I believe the matters and things set forth in the above and foregoing information, are true," which was signed by the deponent, and to which the jurat of a justice of the peace was attached; *Held*, That the information was properly subscribed and sworn to.

When the law speaks of selling intoxicating liquors, directly or indirectly, or on any pretence, or by any device, it is only designed to *describe* different methods of committing the same offence; and it is not necessary that an information should state in what method the selling was accomplished.

Whether the person charged, has sold intoxicating liquors, directly or indirectly, or by whatsoever pretence or device, it is still the same offence; and the law in no sense treats the different means made use of to effect a sale, as constituting a different offence, nor yet as a different species of the same offence.

Where an information charged, that "the defendant did, by himself, for himself, sell intoxicating liquor, viz: whiskey," &c.; *Held*, That the offence was sufficiently charged in the information.

Where in a prosecution for selling intoxicating liquor, the defendant asked the prosecuting witness, on cross-examination, the following question: "State whether you went to the defendant, when you bought the bottle of liquor, to which you testify in your examination in chief, for the purpose of procuring evidence against him for selling intoxicating liquor?" which was objected to, and the objection sustained; *Held*, That the objection was properly sustained.

Error to the Benton District Court.

INFORMATION before a justice of the peace, charging the defendant with having sold intoxicating liquors to divers persons therein named. A motion was made to quash the warrant of arrest, and a demurrer filed to said information, both of which were overruled. Trial by jury, verdict of guilty, judgment thereon, and defendant appealed. In the District Court the judgment of the justice was affirmed, and defendant prosecutes this writ of error. For the facts in the case, see the opinion of the court.

J. D. Templin and *John Shane*, for the plaintiff in error.

E. Humphreville and *S. A. Rice*, (Attorney-General,) for the State.

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WRIGHT, C. J.—The plaintiff in error, claims that the District Court should have reversed the judgment of the justice for the various errors assigned in his affidavit for appeal, and upon the case made by the return of the justice and the entire record. We therefore direct our attention to said affidavit, and so much of the proceedings before the justice as bear upon the question raised. And first, it is urged that the justice erred in overruling the motion to quash the warrant of arrest. So far, we are unable to see any ground whatever for this objection, so far as it relates to the warrant itself. It follows, substantially, and, indeed, almost literally, the form given in the Code, (§ 2827,) and is, therefore, legally sufficient. It is said, however, that it should have been quashed, because there was no information filed before the justice upon which said warrant could regularly issue. The determination of this question brings us to the consideration of said information, and we are thus brought to the inquiry, whether the demurrer filed before the justice to said information, was properly overruled.

And first, under this head, it is insisted that the venue is not sufficiently laid in said information. The defendant, by the information, is charged with selling liquor to six different persons. He was acquitted upon all the counts, except one, and it therefore only becomes material to inquire whether, in that count, the venue is well laid. The caption and part of the first count is as follows:

"State of Iowa v. John Devine. Before W. C. Smith, Justice of the Peace, in and for the county of Benton. The defendant is accused of the crime of selling intoxicating liquors, contrary to law. 1st. For that, on the 28th day of January, A. D. 1857, the said defendant, by himself, for himself, in Vinton county and state aforesaid," &c. In the sixth count, (the one upon which he was convicted,) it is averred, "that said defendant, on the 29th day of January, A. D. 1857, at the place aforesaid," did sell, &c. That this information lays the venue with sufficient certainty, we entertain no doubt. It follows the statute in every essential requisite in this respect, and more than this is not

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required in the District Court; and we certainly shall not require greater particularity in proceedings commenced before a justice.

In the second place, it is insisted that the information was not subscribed and sworn to as required by the Code, § 3323. The exact point here made, it is somewhat difficult to understand. It appears that the complaint or information was made and presented by one Pauly. After charging the defendant with having sold liquor to the several persons therein named, we find at the close thereof, the following affidavit:

"State of Iowa, Benton County. I, James L. Pauly, being duly sworn, depose and say, that I believe the matters and things set forth in the above and foregoing information, are true.

JAMES L. PAULY.

"Subscribed and sworn to before me, this 30th day of January, A. D. 1857.

WM. C. SMITH, J. P."

As we understand the objection, it is that the informant should have subscribed his name at the close of the information, and not to what is termed the affidavit. The affidavit, however, is a part of the information, and when the complaining party affixes his signature to it, he subscribes to the information within the full meaning of the law.

The next objection made is, that the information does not state whether the defendant sold the liquor "directly or indirectly, or whether he did, on any pretence, or by any device, sell, or in consideration of the purchase of any property, give to the persons named the said intoxicating liquors." The charge in the sixth count of the information, as we have already seen, is that the said defendant, by himself, did, for himself, sell intoxicating liquors, viz: whiskey, to &c. The language of the law is, that "if any person by himself, his clerk, servant or agent, shall, for himself or any one else, directly or indirectly, or on any pretence, or by any device, sell, or in consideration of the purchase of any other property, give to any other person any intoxicating

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liquor, he shall be deemed guilty of a misdemeanor," &c. Laws of 1855, 61, §. 6. Now, we suppose it to be sufficient to charge that the defendant did, on such a day, at a place named, sell intoxicating liquor, (naming it, if known,) to a certain person, (giving his name, if known,) and if so, much more clearly would the information be good, when, as in the case before us, it is averred that the defendant did, by himself and for himself, sell said liquor. When the law speaks of selling directly or indirectly, or on any pretence, or by any device, it is only designed to describe different methods of committing the same offence. And it is not necessary that the information should state in what method the selling was accomplished. Whether the person charged, has sold directly or indirectly, or by whatsoever pretence or device, it is still the same offence, and the law, in no sense, treats the different means made use of to effect a sale, as constituting a different offence, nor yet as a different species of the same offence.

We are next led to inquire whether the justice erred in refusing a certain question, propounded by the defendant, to be answered by the person to whom the information, in the sixth count thereof, charges the liquor to have been sold. It seems that he was asked the following question on his cross-examination: "State whether you went to the defendant, when you bought the bottle of liquor to which you testify in your examination in chief, for the purpose of procuring evidence against him for selling intoxicating liquor," which question was objected to by the attorney for the state, and the objection sustained. It is not claimed that the intention with which the witness bought the liquor, whether good or bad, would tend to change the legal character of the act of selling. But it is insisted that the question was proper, on the cross-examination, for the purpose of showing the feeling of the witness and the motives influencing his testimony. We, therefore, treat the inquiry as relating to a collateral fact, made with a view to discredit the witness. Under some circumstances, we can readily see that such a question would be pertinent. If it appeared,

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for instance, that the person, under examination, was what is termed a willing witness; that he readily and easily remembered every circumstance tending to show defendant's guilt, and hesitated as to those matters which made in his favor, the court might well permit the inquiry attempted in this case. But if, on the other hand, he should appear to be an unwilling witness, the whole reason and object of such an inquiry would cease. And, therefore, it is most obvious that the right to make such an inquiry is, to a great extent, in the discretion of the court hearing the cause; and this court should be clearly satisfied that there has been an abuse of such discretion, before a new trial would be ordered. As was said in the case of *Allen v. Bodine*, 6 Barb. 383, "great latitude is sometimes permitted, where, from the temper and conduct of the witness, or other circumstances, such course seems essential to the discovery of truth. It is nearly impossible to lay down a rule on this subject, as the question is always a matter of discretion with the judge, to be decided by him upon all the circumstances appearing before him." In this case, there is nothing to show the temper or conduct of the witness, whether he was a willing or an unwilling one; nor whether he appeared to be friendly or unfriendly to the defendant. The presumption is, that there was no such circumstance as justified the proposed inquiry, and until the contrary is shown, we must conclude that the discretion lodged with the court trying the cause, was properly exercised.

Finally, it is urged that the testimony was not sufficient to justify the verdict. This testimony is spread out in the record, and without here setting it out, it is sufficient to say that we think the jury was fully justified in finding as it did. And, we may go further, and say that to our minds, it is somewhat difficult to understand why defendant, under the testimony, was not proved guilty under more than one count.

Judgment affirmed.

WHITE v. THE STATE OF IOWA.

The marriage of persons, without their having obtained a license, is to be dealt with as a misdemeanor, and in no other manner.

Under chapter 85 of the Code, a justice of the peace possesses no jurisdiction to hear and determine a complaint, charging a party with solemnizing a marriage without a license.

Error to the Muscatine District Court.

A COMPLAINT was entered before a justice of the peace, against the plaintiff in error, for solemnizing a marriage without a license, on the waters of the Mississippi river, within the jurisdiction of the state of Iowa. The justice found him guilty, and rendered judgment against him for the penalty of fifty dollars, from which he appealed to the District Court, where the judgment of the justice was affirmed.

Henry O'Connor and *H. Ambler*, for the plaintiff in error.

Samuel A. Rice (Attorney-General) and *E. H. Thayer*, (prosecuting attorney of Muscatine county,) for the State.

WOODWARD, J.—The determining question in this cause can be sufficiently stated, without a lengthened detail of facts or pleadings. One point made, disposes of the case.

The defendant moved before the justice, and in the District Court renewed the motion, to dismiss the cause; or, in other words, to quash the complaint, for several reasons, among which the sixth was, that the justice had no jurisdiction of the supposed offence, it occurring on the waters of the Mississippi river; and the seventh was, that the allegations of the complainant do not show facts giving jurisdiction, either as to time, place, person or crime. Connected with these points, was the question raised, whether the complaint was for the penalty of fifty dollars, under section 1474 of the Code, or was for a misdemeanor, under section

1470. The complaint being lost, and there being no copy of it on file, of course we cannot determine this question, but the counsel agree that the court may dispose of the matter as they may, upon the record and papers belonging to the case.

Under these circumstances, we should be compelled to give weight to the entry of the magistrate, and the pleadings and proceedings in court, but these are ambiguous in this respect, and indeterminate, except that the judgment rendered in both courts, seems to point to section 1474, as the foundation; that is, to make it a *qui tam* proceeding in its nature. But this is immaterial. We proceed to show that, regarded as a proceeding to recover the penalty of fifty dollars, under section 1474, it does not lie in this case; and as a complaint for a misdemeanor, it is not within the jurisdiction of a justice of the peace.

Chapter 85 of the Code, provides the conditions and requisites of marriage, and the duties and liabilities of those who are authorized to solemnize marriage. Sections 1464 to 1470, inclusive, contain important provisions. The marriageable age is fixed; a license must be obtained before marriage; such license must not, in any case, be granted where either party is under the age necessary to render the marriage valid, nor when either party is a minor, without the consent of the parent or guardian, nor when the condition of either party is such as to disqualify him from making any other civil contract; and unless the county judge is acquainted with the age and condition of the parties, he shall take testimony. These provisions are of the highest importance to the permanent interests and happiness of the parties, and to the domestic and social relations. With a view to these provisions, and under these considerations, section 1470 enacts, that if the county judge grants a license, contrary to the provisions of the preceding sections, he is guilty of a misdemeanor, and if a marriage is solemnized without such license being procured, the parties so married, and all persons aiding in such marriage, are likewise guilty of a misdemeanor. The statute has not been content to leave

these important requirements under the protection of a simple penalty of fifty dollars, but has guarded them by the full extent of the punishment for misdemeanors. The license is made a leading requisite, and to marry or be married without a license, is subject to a penal provision next to actual crime. There are other requirements, of minor consequence when compared with the foregoing, which may be considered as guarded by the penalty of section 1474; but we can reconcile the different parts of the chapter, only by holding that the marriage of persons without a license, is to be dealt with as a misdemeanor, and in no other manner. Regarded in this light, the supposed offence in the present case, is not within the cognizance of a justice of the peace.

By section 3322 of the Code, justices may hear, try, and determine public offences, where the punishment imposed by law, does not exceed two hundred dollars fine, or imprisonment in the county jail not more than six months, or where the punishment is by both such fine and imprisonment, whilst, by section 2676, a misdemeanor, the punishment of which is not otherwise prescribed by any statute of this state, may be punished by imprisonment in the county jail for one year, or by a fine to the extent of five hundred dollars, or by both of these. There is no punishment, "otherwise prescribed," for the misdemeanor here charged; and therefore it falls under this section, and consequently is beyond the jurisdiction of a justice of the peace to hear and determine. The magistrate might have held the defendant to answer before the District Court, but it was not within his province to try the cause. It follows, that the proceeding should have been dismissed on the appeal; that the judgment of the District Court must be reversed, and the recognizance of the defendant be discharged; and that he go hence without day.

An interesting question was presented concerning jurisdiction upon the waters of the Mississippi river, but it has become unnecessary to enter upon it.

Judgment reversed.

Beekman v. The State of Iowa.

BEEKMAN v. THE STATE OF IOWA.

Where a motion is made to dismiss an appeal in a criminal case, for insufficiency of the affidavit of appeal, the facts stated in the affidavit are to be taken as true.

If the State wishes to controvert the statements of the affidavit for an appeal, as to the testimony given on the trial before the justice, a rule should be obtained requiring the justice to certify to the District Court, all the evidence on the trial before him.

Where an affidavit for an appeal in a criminal case, sets out the evidence against the defendant, and avers that the State has failed to prove any charge laid in the information; that the judgment of the justice was erroneous, and contrary to the evidence; and that injustice has been done the defendant, it is sufficient to entitle the defendant to an appeal, and to have the judgment of the justice reversed, or, at least, to a new trial in the District Court.

Error to the Mahaska District Court.

THIS was a writ of error to the judgment of the District Court of Mahaska county, affirming the judgment of a justice of the peace, by which the plaintiff in error, was fined twenty dollars on an information charging him with selling intoxicating liquors. After the rendition of the judgment against him by the justice, the defendant filed an affidavit to obtain an appeal, in which is stated the evidence of the witnesses against him, and averred that the State had failed to prove any charge laid in the information; that the judgment of the justice was erroneous and contrary to the evidence, and that injustice had been done him. On filing the necessary bond, an appeal was allowed. In the District Court, on motion of the prosecuting attorney, the judgment of the justice was affirmed, for the alleged reason, that no sufficient affidavit had been filed. The defendant sued out this writ of error.

Crookham & Fisher, for the plaintiff in error.

Saml. A. Rice, (Attorney-General,) for the State.

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STOCKTON, J.—The affidavit was sufficient to entitle the plaintiff in error, to an appeal from the judgment of the justice, and to have the judgment reversed, or, at least to a new trial in the District Court. Taking the facts therein stated as true, which is the effect of a motion to dismiss for insufficiency, there was no evidence before the justice to convict the plaintiff in error, of selling intoxicating liquors. The witnesses testified that he sold only "spruce beer," and that it would not intoxicate any person. If the prosecuting attorney wished to controvert the statements of the affidavit, as to the testimony given on the trial before the justice, he should have had a rule entered against the justice, to certify to the District Court all the evidence given on the trial before him. As this was not done, the statements of the affidavit are to be taken as true; and taking them as true, the plaintiff in error was found guilty on insufficient evidence. The District Court should either have reversed the judgment, or allowed a new trial.

Judgment reversed.

 McCLINTOCK v. CRICK.

In slander, a plea of justification must confess the speaking of the words charged, and set forth such facts as fix upon the plaintiff the specific crime imputed to him by the words charged in the petition.

Where, in an action for slander, for charging the plaintiff with stealing the chickens of defendant, the defendant answered as follows: "And for a further answer, defendant says, that the said plaintiff, either in person or through his children, and with plaintiff's knowledge and consent, did kill, take and carry away, and appropriate to his own use, chickens belonging to defendant;" *Held*, That the answer was bad, as a plea of justification.

Where the slanderous words charged, were spoken through heat of passion, or under excitement produced by the immediate provocation of the plaintiff, such facts may be shown in mitigation of damages, under our practice, without alleging them specifically in the answer.

Where in an action of slander, the defendant pleaded, that the words charged, if spoken by him, were spoken at a time when the plaintiff was speaking and uttering false and scandalous words about defendant, (setting out the words,) and at a time when defendant was angry and in a passion, occa-

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sioned by the speaking of said false and scandalous words by the plaintiff, which was demurred to, and the demurrer sustained; *Held*, That there was no error in sustaining the demurrer.*

Where an action of slander was commenced in October, 1852, and at the return term, the defendant answered, denying the speaking of the words; and where on the 26th of March, 1855, the defendant filed a further answer, to which a demurrer was sustained, and the cause stood at issue, on the answer filed in 1852, until the 13th day of April, 1857, when the defendant filed what is termed "a further and additional answer," in which he claimed a certain sum of money for the value of four dozen chickens, and damages for slanderous words spoken by the plaintiff of the defendant, and also alleged, that the plaintiff's character was so bad, in the community in which he resided, that he sustained no injury from the speaking of the words by defendant, which answer, on motion of the plaintiff, was stricken from the files; *Held*, That under the circumstances of the case, there was no error in striking the answer from the files.

Where notice was given of the taking of a deposition "at the office of *Squire Moore*, in Ashland, Wappello county, Iowa, on the 10th day of April, 1857, and it appeared from the caption and certificate of the deposition, that it was taken on the day named in the notice, at the office of *Enos Moore*, a justice of the peace, of Wappello county; *Held*, That the deposition was properly suppressed.

However much passion, produced by the provocation of the plaintiff, may operate to mitigate the damages in an action of slander, it cannot wholly defeat the plaintiff's action.

Where in an action of slander, the court refused to instruct the jury, "that if the words were spoken by defendant, through heat of passion, caused by harsh and abusive words used by plaintiff towards defendant, then the words are not actionable, and they must find for defendant;" *Held*, That the instruction was properly refused.

In an action of slander, it is sufficient to prove the slanderous words substantially.

And where in such an action, the court instructed the jury, that it was not necessary for the plaintiff to prove the precise words as laid in the petition, but that it was sufficient to prove them substantially, as there set out; *Held*, that the instruction was correct.

Where in an action, when the jury was about to retire to consider of their verdict, the defendant asked that the jury might be permitted to take with them, all the papers in the cause, except depositions, and particularly the affidavits filed by plaintiff at previous terms for a continuance, which the court refused to permit, and retained the affidavits, and all the pleadings to which demurrers had been sustained; *Held*, That the court did not err in refusing to permit the papers to go to the jury.

Appeal from the Jefferson District Court.

THIS was an action on the case for slanderous words

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spoken, commenced in October, 1852. At the return term, defendant appeared and filed his answer, denying the speaking of the words, as charged in plaintiff's petition. On the 26th of March, 1855, defendant filed a further answer, to which there was a demurrer, which was sustained. In April, 1857, defendant filed what is termed "a further and additional answer." Plaintiff moved to strike this answer from the files, and also demurred to the same, which said motion and demurrer were sustained, as to different portions of said answer. A motion was made to suppress the deposition of one Laforce, taken on the part of defendant, which was also sustained. On the trial, certain instructions, given by the court, were excepted to by defendant, and he, in like manner, excepted to the refusal of the court to give certain instructions asked by him. When the jury were about to retire to consider of their verdict, the defendant asked that they might be permitted to take with them certain papers, which was refused by the court. Verdict and judgment for plaintiff, and defendant appeals. The other material facts will be found in the opinion of the court.

C. Negus, for the appellant.

Slagle & Acheson, for the appellee.

WRIGHT, C. J.—The answer, filed in April, 1857, sets up some of the same matters of defence as are contained in the one filed in March, 1855. The defendant, in the last answer, attempts to plead these matters in a more logical and definite form; and we need not, therefore, stop to inquire into the sufficiency of these portions of the first answer. By filing the further and additional answer, and thus, in effect, in this case, amending his former pleadings, defendant waived all right to complain of any supposed error in the ruling, made on the first demurrer, so far as that demurrer raised the same questions as were raised by the second one.

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In the first answer, however, there is what is claimed to be, a plea in justification, which is not contained in the second, and it is urged that the court erred in sustaining plaintiff's demurrer to such plea. The substance of this portion of the answer is as follows: "And for a further answer, defendant says that the said plaintiff, either in person or through his (plaintiff's) children, and with plaintiff's knowledge and consent, did kill, take and carry away, and appropriate to his own use, chickens belonging to defendant." To understand this language, it is proper to state that plaintiff claims that defendant charged him, on several occasions, with stealing his (defendant's) chickens. That this allegation of the answer is wanting in almost every essential to make it a good plea of justification, is most manifest. It fails to confess the speaking of the words. See Starkie on Slander, 248. It fails to set forth such matters as fix upon the plaintiff any crime, much less the specific one imputed to him by the words charged in the petition of plaintiff. The justification, so far from being in point of law, identical with the charge in the petition, falls short of justifying any offence, or of showing that, in the taking of said chickens, there was any crime whatever. That a plea, which relies upon the truth of the words spoken, as a bar to recovery, is fatally defective, which is wanting in the particulars above suggested, is well settled. See 1 American Leading Cases, 178, and cases there cited.

The questions raised by the demurrer, and motion to strike the second or last answer, may be considered under two heads: First, such as relate to those portions which were set up in the answer, filed March 26, 1855. Second, such as relate to the new and distinct grounds of defence, therein contained. In the third clause of his answer, defendant sets up that said words, charged in plaintiff's petition, if spoken by him, were spoken at a time when plaintiff was speaking and uttering false and scandalous words about defendant, (giving the words spoken by plaintiff) and at a time when defendant was angry and in a passion, occasioned by the speaking of said false and scandalous words by plain-

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tiff. That the matters contained in this clause, if true, would not bar plaintiff's recovery, we suppose to be too well settled to admit of controversy. If, however, the words were spoken through heat of passion, or under excitement, produced by the immediate provocation of plaintiff, such excitement or passion may be shown in mitigation of damages; "for evidence that the speaking was impulsive and involuntary, undoubtedly diminishes malice, as understood by the law." *Larned v. Buffington*, 8 Mass. 546; *Seely v. Lovejoy*, 8 Blackf. 462. And, it may be stated as a general principle, that all the immediate circumstances, under which the words were spoken, are proper to be shown to the jury, as they define the true character of the speaking, which is alleged to be slanderous. See note to *Gilman v. Lovell*, 1 American Leading Cases, 208. And this passion—this provocation—and their immediate circumstances, may be shown, without specially setting them up or pleading them. Under the former system of pleading, they might be shown under the general issue; and so, we think, they may be under our practice, without alleging them specifically in an answer.

In the case before us, as these matters were set up, we think the court might well have overruled the demurrer, upon the ground that plaintiff could not complain, if by such answer, he was notified that defendant would insist on the trial, that the words were spoken under the circumstances stated. But as the thing, if proved, could not bar plaintiff's recovery, but might under the general denial of the speaking of the words, be received in mitigation of damages, we cannot say there was error in sustaining the demurrer to this portion of the answer. If it appeared that defendant proposed to prove the same facts on the trial, and was not permitted to do so, the question would be quite different. Nothing of the kind is shown, however. For aught that is disclosed, he had the benefit of all these circumstances on the hearing before the jury. There was certainly nothing to prevent it.

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In the first, second and fourth clauses of the answer, it is set forth, (but with what legal sufficiency, we do not stop to inquire,) *first*, that plaintiff is owing and stands indebted to defendant in the sum of six dollars, for the value of four dozen chickens; *second*, that plaintiff spoke of defendant certain scandalous and defamatory words, to his (defendant's) great damage and injury, which sum of six dollars, and the damages resulting from such slanderous words, defendant proposes to offset against any damages which plaintiff may show he has sustained by the supposed speaking of the words charged in plaintiff's petition; and *third*, that plaintiff's character was so bad in the community in which he resided, that he sustained no injury from the speaking of the words by plaintiff. All these matters were struck from the files, on the plaintiff's motion, and this is now assigned for error. We cannot say that the court erred in sustaining this motion. It will be remembered that this case was commenced in 1852, and that at the first term, defendant filed his answer, denying the speaking of the words. On that issue, a trial was had, in which plaintiff recovered. Defendant appealed to this court, where the decision was in his favor. The cause being remanded, a further answer was filed in March, 1855, which, however, contained none of these matters now under consideration. The demurrer to the answer filed in 1855, being sustained, the case stood at issue upon the answer filed in 1852, until the 13th of April, 1857, (the day before the cause was finally tried,) when the defendant sets up in his defence new matter—matter which raises new issues, and which must almost as a necessary consequence, work a continuance of the cause. No reason is shown why these same matters were not set up long before this trial. There is nothing to show that they came to defendant's knowledge since filing his former answer; nor does it appear but that he knew them all as well before, as after first pleading to plaintiff's petition. Under such circumstances, we are far from being satisfied that there was error in refusing to defendant the benefit of such further or supplemental answer. To allow a party to make such a

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supplemental pleading, rests so peculiarly in the discretion of the court below, that we should want to be much better satisfied than we are in this case, that such discretion had been improperly exercised, before we would interfere with it.

We are next to inquire, whether there was error in suppressing the deposition of the witness Laforce. It seems that plaintiff was notified that the deposition of this witness, would be taken at the office of Squire Moore, in Ashland, Wappello county, Iowa, on the 10th day of April, 1857. The caption and certificate attached to the deposition, show that it was taken on the same day named in the notice, at the office of Enos Moore, a justice of the peace of Wappello county. The objection urged is, that it does not appear that the deposition was taken at the office of Squire Moore, as stated in the notice, but that, on the contrary, it was taken at the office of Enos Moore. The Code provides that reasonable notice of the time and place where a deposition will be taken, must be given to the opposite party; and the certificate to be attached to the deposition, when taken, must state that it was subscribed and sworn to at the time and place therein mentioned. §§ 2446, 2458. We need hardly say, that the deposition must, in the absence of agreement or consent, express or implied, to the contrary, be taken at the place named in the notice, and that if taken at any other place, it should be suppressed. The question in this case is whether, (plaintiff not having appeared or taken part in the examination,) it sufficiently appears that this deposition was taken at the place named in the notice. And to hold that it does sufficiently appear, we are asked to conclude or presume that Squire Moore and Enos Moore are one and the same person, and that the office of Squire Moore is the office of Enos Moore. We think that this would be asking us to presume too much. The objection of plaintiff may in fact be purely technical, and yet we cannot think we would be justified in holding the persons to be the same. If the notice had designated the magistrate as Esquire Moore, there would be less force in the plaintiff's objection. By such a

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designation or title, the party might well be understood to refer to a justice of the peace—to an officer in his official capacity. When in the use of proper language, however, we speak of Squire Moore, Esquire Smith, or Squire Jones, it cannot with propriety be said, that we refer to these persons as magistrates, but that we call them by their proper Christian names. Squire, if not in so general use, is at least, as well recognized as a name, as John, or Robert, or Enos; and we cannot but conclude, that the objection in this case is equally as available, as if the notice had specified the office of John, instead of Squire Moore.

The defendant asked the court to instruct the jury, that if the words were spoken by defendant through heat of passion, caused by harsh and abusive words used by plaintiff, towards defendant, then the words are not actionable, and they must find for defendant, and this refusal is now assigned for error. We have already, in considering the demurrer to the third clause of defendant's answer, sufficiently disposed of this objection. However much such passion and provocation might operate to mitigate the damages, they could not wholly defeat plaintiff's action. It is next objected that the court instructed the jury, that it was not necessary for plaintiff to prove the precise words as laid in the petition, but that it was sufficient to prove them substantially as there set out. That this is the rule now universally recognized in actions of this kind, we understand to be well settled. *Olmstead v. Miller*, 1 Wend. 506; *Bassett v. Spofford*, 11 N. H. 127; *Leniville v. Earlywine*, 4 Blackf. 470; *Starkie Ev.* Vol. II, 618, 619, and notes.

When the jury were about to retire to consider of their verdict, the defendant asked that they might be permitted to take all the papers in the case, except depositions, and particularly the affidavits filed by plaintiff at previous terms, for a continuance. The court refused, however, to permit this, and retained these affidavits, as also all the pleadings to which demurrers had been sustained, and defendant again excepted. The Code provides that the jury upon retiring for deliberation, may take with them all pa-

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pers, except depositions, which have been received as evidence in the cause. § 1788. In this case, there is no pretence that the affidavits for a continuance were used as evidence. As papers in the cause, the jury had nothing to do with them. And the same is true of the answers to which the demurrers had been sustained; so far as that trial was concerned, they were as though they had never been filed.

We have thus disposed of all the errors assigned, and conclude that the judgment of the court below must be affirmed.

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Jurors cannot be compelled to make affidavits, showing that the jury disregarded, and refused to take into consideration, the instructions of the court. Nor can the declarations of jurors be received, to prove such a state of facts.

Where in a criminal case, the defendant filed a motion for a new trial, for the following reasons: 1. That the verdict was not warranted by the evidence; 2. That the verdict was contrary to law; which motion was sustained by an affidavit of his attorney, which alleged that one of the jurors stated after the trial, that the jury, in finding the verdict of guilty, disregarded, and did not take into consideration, the instructions of the court, but considered them contrary to law, and that they were not bound to consider them; and that said juror refused to make affidavit to the above statement, but said that it was true, which motion was overruled by the court; *Held*, That the motion was properly overruled.

Error to the Davis District Court.

THE plaintiff in error was convicted of a misdemeanor, and filed a motion for a new trial upon the following three grounds:

1. That the verdict was not warranted by the facts shown by evidence.
2. That the verdict was contrary to law.
3. That the verdict was contrary to the evidence.

To support this motion, the defendant offered the affidavit of his attorney, to the effect that Joseph Hopkins, one of the jurors, stated after the trial, that the jury, in finding the

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verdict of guilty, disregarded and did not take into consideration, the instructions of the court, but considered them contrary to law, and that they were not bound to consider them in deliberating on the case; and that said juror refused to make affidavit to the above statement, but said it was true. The error assigned is in the refusal of the court to receive the above affidavit, and in ruling that he would not receive the affidavit of a juror to the foregoing matter.

S. G. McAchran, for the plaintiff in error.

Samuel A. Rice, (Attorney-General,) for the State.

WOODWARD, J.—It is the opinion of this court, that the court below did not err in refusing to listen to the affidavit offered. If the juror would not make affidavit to this matter, it could not be shown by proving his declarations. We do not say that a juror's declarations cannot be received in any case, but think they cannot be to prove the matter in the present instance. By section 1810 of the Code, the affidavits of jurors may be received on applications for new trials. But they cannot be compelled to make them, (*Foshee v. Abrams*, 2 Iowa, 571,) and it is not clear that they could be received to impeach their verdict. In the present case, it does not appear that the defendant offered the affidavit of a juror. On the contrary, the counsel, in his affidavit, states that this juror refuses to swear to the statement, and he does not appear to have had that of any other. So far as the case shows anything on this point, it shows that the party could not obtain the affidavit of a juror, and in this the court cannot aid him.

We are not asked to determine whether the verdict was against the law or the evidence, (although the motion for a new trial is based upon this ground,) for none of the evidence is brought up, and the assignment of errors does not reach this point.

The judgment of the District Court is affirmed.

Gilson v. Johnson.

GILSON v. JOHNSON.

An appeal lies from a judgment of nonsuit, rendered by a justice of the peace. On appeal, the cause is to be tried on its merits, and errors and irregularities before the justice, disregarded.

A party cannot successfully urge an error in the proceedings of the court, which worked him no prejudice.

Appeal from the Marion District Court.

REPLEVIN for a chest of carpenter's tools. The cause was originally tried before a justice of the peace, and judgment rendered against the plaintiff for nine dollars and costs. The transcript of the justice shows that on trial before him, the plaintiff, after examining one witness, and reading a receipt to the jury, which was not objected to, rested his cause.

The defendant then moved for a nonsuit, on the ground that plaintiff's witness had not been sworn. The justice then refused to swear the witness, and suffer him to give his testimony under oath, and judgment of nonsuit was rendered against the plaintiff, and also judgment in favor of defendant for nine dollars, an amount claimed by defendant as due him from plaintiff. On appeal to the District Court, the defendant moved first to dismiss the appeal, and that motion being overruled, he moved to affirm the judgment of the justice, which motion was also overruled, and defendant excepted. On trial in the District Court, plaintiff offered evidence to prove his ownership of the property replevied, and its wrongful detention by the defendant. Whereupon defendant objected to the cause being tried again on the merits, which objection was overruled, and on a hearing, judgment was rendered for the plaintiff, from which defendant appeals.

J. E. Neal, for the appellant.

No appearance for the appellee.

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STOCKTON, J.—The only reason urged by defendant, why the District Court should have dismissed the appeal, is that no appeal lies from a judgment of nonsuit. To the contrary, see Code, section 2328; *Griffin v. Moss*, 3 Iowa, 261. But this was more than a judgment of nonsuit. The defendant recovered judgment for nine dollars against the plaintiff. Defendant claims that the District Court, should have affirmed the judgment of nonsuit entered by the justice, because a motion made by defendant before the justice to quash the writ of replevin and dismiss the suit, was improperly overruled.

It is also further insisted that the District Court erred in permitting a trial on the merits, on the appeal. In answer to these objections, it is only necessary to refer to section 2341 of the Code: "An appeal brings up a cause for trial on the merits and for no other purpose; all errors and irregularities before the justice are to be disregarded."

The remaining objection is, that the District Court did not render judgment against defendant, for any amount in damages. This objection cannot be made by the defendant, because of it was a valid one, he is not prejudiced thereby. It is sufficient, if the judgment was satisfactory to the plaintiff.

Judgment affirmed.

BEAN v. BRIGGS & FELTHOUSER.

The courts of Iowa will not take judicial notice of the laws or statutes of another state.

Where a controversy arises in our courts, upon a contract made in another jurisdiction, *prima facie* it is to be governed by the laws of this state.

If it is claimed that the law of the place of contract, establishes a rule unknown to our law, such foreign law should be proven, and to be admissible in proof, should be properly averred, or set out in the pleadings.

If a party would introduce proof of the laws of a foreign state, it is not sufficient to aver, as a plaintiff, that his right to recover is warranted by the law or statute of another state, where the contract was made; nor is it

4	464
89	488
4	464
83	746
4	464
95	713
4	464
106	457
4	464
119	123
4	464
138	204

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sufficient for the defendant to aver, that the plaintiff cannot recover, by reason of the provisions of such foreign statute; but he must plead the particular statute relied upon, and set it out, as he would any other fact in the case, that the court may be able to see and judge, whether the proceeding is warranted, or the defence tenable, under such law.

The system of pleading and practice introduced by the Code, contemplates plainness of averment, and a clear and logical statement of the very matter relied upon for a recovery or defence, with even more particularity than was necessary under the common-law practice.

Where in an action by the indorsee against the indorsers, on a certificate of deposit, made in Illinois, by the Phoenix Bank of Chicago, one of the defendants answered, averring as follows: "And defendant denies that the plaintiff has any cause of action against him, because he says said supposed contract was made and entered into in the state of Illinois, and not in the state of Iowa. And defendant denies that plaintiff has exhausted his remedy against the maker of said certificate;" and where on the trial, the defendant offered in evidence, a printed copy of the statute of Illinois, for the purpose of showing that, under said law, it was the duty of plaintiff to attempt to collect said demand from the maker, by the institution of legal proceedings, or that such proceedings, in consequence of the maker's insolvency, would have been unavailing, which evidence was objected to by the plaintiff but the objection was overruled, and the evidence admitted; and where the court instructed the jury, that "it devolved on the plaintiff to show affirmatively, that he had complied with the law of Illinois, and exhausted his remedy against the makers of said certificate, and there being no allegation nor proof of the institution of a suit against the maker, nor of the insolvency of the Phoenix Bank, they should find for the defendant;" *Held*, That the evidence was improperly admitted, and that the instructions were erroneous.

Appeal from the Dubuque District Court.

PLAINTIFF claims as the indorsee of a certificate of deposit, made in Illinois, by the Phoenix Bank of Chicago, and indorsed by defendants. Briggs alone was sued, and in his answer, among other things, is the following averment: "And defendant denies that plaintiff has any cause of action against him, because he says said supposed contract was made and entered into in the state of Illinois, and not in the state of Iowa. And defendant denies that plaintiff has exhausted his remedy against the maker of said certificate, and denies that he is, in any manner, liable thereon." On the trial, the defendant offered in evidence, a printed copy of the statute of Illinois, for the purpose of showing that, under

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said law, it was the duty of plaintiff to attempt to collect said demand from the maker by the institution of legal proceedings, or that such proceedings, in consequence of the maker's insolvency, would have been unavailing. To this testimony the plaintiff objected, on the ground that the answer contained no allegation that such was the law in Illinois, or that the law of that state was, in any manner, different from the general commercial law, which objection was overruled, and said evidence received. The court, also, charged the jury that it devolved on the plaintiff to show, affirmatively, that he had complied with the law of Illinois, and exhausted his remedy against the maker of said certificate, and there being no allegation nor proof of the institution of a suit against the maker, nor of the insolvency of the Phoenix Bank, they should find for the defendant. To such instruction plaintiff excepted, and there being verdict and judgment against him, he now appeals.

Wiltze & Blatchley, for the appellant.

That the rights of the parties in this case, are to be determined by the laws of Illinois, there is no doubt. But *prima facie*, the laws of Illinois will be deemed to be the same as the laws of our own state. 8 Barb. Sup. Ct., 20; 1 Cowen, 109; Cowp. 174; 8 Mass. 101; 10 Wend. 78.

If it is desired to show that the foreign law of any particular state or country establishes certain rules not known to our law, these provisions of the foreign law should be averred and set out in the pleadings. 1 Chitty's Pl. 247; 6 Conn. 486; 1 Seld. 452; 26 Vt. (3 Deane) 698; Hardin, 168; 8 John. 193, 194; 2 Mass. 87.

The rules which should govern in pleading a foreign law, would seem to be the same as those which would govern in pleading a special custom or a private statute in our own state. In the latter cases, it is well established that the custom or statute itself must be recited. 2 Cowen's Tr. 6; Gould's Pl. 55, § 16.

If defendants intended to show that the rule of decision in Illinois, was different from that of Iowa, they should

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have recited the statute, or, at least, have stated the rule clearly and distinctly; and they should have alleged it to be the rule of the law in Illinois. All they have done, is to allege that the contract was made in Illinois, which appeared on the face of the petition; that the law of Illinois, therefore, furnishes the rule of decision, a statement of the law undoubtedly correct; and that plaintiff has not exhausted his remedy against the maker, which the petition does not affirm. Here is no recitation, or even allegation of any rule in Illinois, different from our own rules. The denial that plaintiff has exhausted his remedy against the maker, has no meaning under any law of which the court can take judicial cognizance, and there is no law of Illinois set out to give it meaning. The fact that the petition does not show the remedy against the maker to have been exhausted, might have been a good ground of demurrer in an Illinois court, and, in truth, the case seems to have gone off in the court below, as upon such demurrer.

Foreign laws are facts; and what is the foreign law, is a question of fact to be determined according to some decisions by the court, and according to other decisions, exclusively by the jury. 2 Cranch, 236; Story's Conf. Laws, §§ 637, 638; 7 Metc. 384.

Foreign laws, being facts, should be pleaded issuably. What issue could possibly be taken in this case? And they should be pleaded in such a manner that the testimony offered to prove them, could be introduced in support of some allegation made. What allegation, contained in the answer, did the testimony offered, prove or tend to prove?

That the laws of the other states of this Union are deemed foreign laws, *vide* 1 Seld. 452; 1 Rawle, 389. See Am. Com. Law, title Foreign Law.

Cooley & Adams, for the appellee, cited the following authorities: 16 Johns. 249; 1 Cow. 107; 1 Johns. Cases, 189; 12 Johns. 142; 3 Ib. 268; 7 Ib. 117; 3 Caines, 154.

WRIGHT, C. J.—It is conceded in the argument that the

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certificate of deposit, was made and indorsed in Illinois. It is further admitted by appellants, that the law of that state entered into, and became a part of the contract of indorsement, and that the liability of the defendant, must be determined by said laws. And thus we perceive that we are left to inquire whether, under the pleadings, the testimony offered was admissible, and whether the instructions based thereon, should have been given. And this inquiry we must answer in the negative. We suppose it to be well settled, that the courts of this state will not take judicial notice of the laws or statutes of another state. If a controversy arises in our courts upon a contract made in another jurisdiction, *prima facie* it is to be governed by the law of this state, for the reason, that as we know nothing, in the first instance, of the statutes of such foreign jurisdiction, we presume them to be the same as ours, and therefore make ours the rule of decision. And, therefore, if it is claimed that the law of the place of contract, establishes a rule unknown to our law, such foreign law should be proven, and to be admissible in proof, should be properly averred or set out in the pleadings. The established doctrine now is, that no court takes judicial notice of the laws of a foreign country, but they must be proved as facts. Story's Conf. of Laws, § 687, and the authorities cited in note 2. And if a party would introduce such proof, it is not sufficient to aver, as a plaintiff, in his pleadings, that his right to recover is warranted by the law or statute of another state, where his contract was made; nor as a defendant, in his answer, that plaintiff cannot recover by reason of the provisions of such foreign statute, but he must plead the particular statute relied upon, and set it out, as he would any other fact in the case, that the court may be able to see and judge whether the proceeding is warranted, or the defence tenable, under such law. 1 Chitty Pleading, 247; *Holmes v. Broughton*, 10 Wend. 75; *Pearsoll v. Dwight*, 2 Mass. 34.

In the case before us, there is no pretence that the statute of Illinois, relied upon, is set out in the answer. Nor, indeed, is there any statute even referred to by the pleader.

Talty v. Lusk.

It is simply averred that the contract was made in Illinois, and not in Iowa—an averment, which standing alone, is without either pertinency or force. For though made in Illinois, it is not presumed by our courts, as already shown, that a different rule of decision is applicable to it, than would be, if made in this state. Under such an averment, we are very clear that it was not proper to admit proof of the laws of Illinois. It is said, however, that it appears from the petition, and was established by plaintiff's proof, that the contract was made in Illinois, and that it was his duty, therefore, to show that under said law, defendant was liable. But it must be remembered that he had brought his action under our law, and he had a right, therefore, to claim that the court could only administer the *lex fori*, until it was in some legitimate manner shown that the *lex loci* was different. And finally, it is insisted that this pleading was sufficient under the Code, to authorize the admission of this evidence. We do not so understand the system of pleading and practice introduced by the Code. It contemplates plainness of averment, and a clear and logical statement of the very matter relied upon for a recovery or defence, and even more particularly than was necessary under the common law practice. If the averment would, as we have seen, at common law, been insufficient to admit this proof, much more is it defective under the Code.

We think that the evidence should not have been received, and that the court erred under the circumstances, in giving the instructions stated, to the jury.

TALTY v. LUSK.

If a party, without objection, permits the instructions of the court to be handed to the jury in writing, without having been read to them, it is too late after verdict, to make the objection that the instructions were not read to the jury.

A party may insist on having the instructions read to the jury before they re-

Talty v. Lusk.

tire to consider of their verdict, and if the court refuse him this right, he may take his exception.

It is the duty of a party to ascertain at the proper time, what instructions are given or refused, and to take his exceptions accordingly.

After verdict, it is too late for a party to object that he did not know what instructions were given, or that they were not read over to the jury.

Where a party is dissatisfied with the instructions given, or where the court refuses to give instructions asked for by him, he must except at the time of giving and refusing such instructions.

Where in an action of replevin, it appeared from the record, that in the District Court, the attorneys on both sides, in the argument, read instructions to the jury; that the court passed upon the instructions, marking some, "given," some "refused," and some "modified," and gave them to the jury, without again reading them, no objection being made by counsel; that after the jury returned their verdict, a motion was made for a new trial, on the ground that the court erred in giving, and in refusing to give the instructions, and also that the instructions were not read to the jury, at which time, exceptions were taken to the instructions given and refused, which motion was overruled by the court; and where it further appeared from the record, that the court gave an oral charge to the jury, which was not made a part of the record; *Held*, That the motion for a new trial was properly overruled.

Appeal from the Henry District Court.

ACTION of replevin, originally commenced before a justice of the peace, and taken by appeal to the District Court. It appears from the bill of exceptions, that in the District Court, the attorneys on both sides read the instructions to the jury in the arguments; that the court passed upon them, marking some "given," some "refused," and some "modified," and gave them to the jury without again reading them—no objection being made by counsel. When the jury returned their verdict, a motion was made by defendant for a new trial, at which time exceptions were taken to the instructions given and refused, and also to their not being read to the jury. The bill of exceptions further states that the court gave an oral charge to the jury, and that inasmuch as they returned in a few minutes with their verdict, the court was satisfied that they did not read the written instructions, and could not have been misled by them. The jury found for the plaintiff, and assessed his damages. The defendant then moved the court in arrest of judgment,

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and for a new trial. The motion was overruled and judgment rendered on the verdict. Defendant appeals.

J. C. Hall, for the appellant.

No appearance for the appellee.

STOCKTON, J.—The first question raised by defendant, is as to the manner in which the instructions were given to the jury, by the District Court. If a party, without objection, permits the instructions of the court, to be handed to the jury in writing, without having been read to them, under the supposition that they will be read by the jury in their retirement, it is too late after verdict to make the objection. He may insist on having the instructions read to the jury, before they retire to consider of their verdict, and if the court refuse him this right, he may take his exception. It is too late, however, after verdict, to object that he did not know what instructions were given, or that they were not read over to the jury. It is the duty of the party, to ascertain at the proper time, what instructions are given and refused, and to take his exceptions accordingly. The objections come entirely too late, if made for the first time after the verdict.

The second error assigned is upon the judgment of the District Court, in refusing to order a new trial. The grounds urged in the motion were, that the court erred in giving certain instructions asked by plaintiff, and in refusing those asked by defendant. It will not be necessary for us to set forth these instructions. We see no reason for interfering with the action of the District Court, or for reversing its judgment, for the following sufficient reasons:

1. The instructions were given and refused, and no exception was taken by defendant at the time.

2. The record shows that the court delivered an oral charge to the jury, in addition to the instructions given in writing. This charge is not embodied in the bill of exceptions, and is not otherwise made part of the record.

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8. The record gives only a part of the evidence on the trial before the District Court, and we are not enabled to discover from the portion of it set forth, wherein the court, in refusing to direct a new trial, has exercised the discretion vested in it, to the prejudice of the rights of defendant.

Judgment affirmed.

HAIGHT & BRO. v. STEAMBOAT HENRIETTA.

The seizure and sale of a steamboat under the laws of the state of Missouri, will not divest the lien of a citizen of the state of Iowa, for supplies furnished such boat, while navigating the waters of this state.

Where in an action against a steamboat, to enforce a lien for supplies furnished, it appeared that the articles were furnished to said boat, in the fall of 1855, in the city of Keokuk and state of Iowa; that afterwards, on the 20th of November, 1855, said boat was seized under a warrant, at the suit of D. and others, under the laws of the state of Missouri, for an indebtedness contracted while navigating the waters of that state; that under an order of court in Missouri, the sheriff, on the 22d of December, 1855, sold the said boat, with all her tackle, fixtures, and furniture, to one M., who is still the owner, and who defends this suit; and that the notice of the suit of D. and others was limited to creditors having liens against said boat under the laws of Missouri, which laws excluded non-resident creditors, or those having debts contracted out of the state; *Held*, That the lien of the plaintiff was not destroyed by the proceedings in Missouri, and that the boat was liable.

Appeal from the Lee District Court.

THIS action was brought before a justice of the peace, in June, 1856, to recover for certain supplies furnished said boat. In the District Court, the facts were found by the judge to be as follows:

1. That the articles claimed by plaintiff, and of the value as claimed, were furnished to said boat, in the fall of 1855, in the city of Keokuk, in this state.

2. That afterwards, on the 20th of November, of the same year, said boat was seized under a warrant, at the suit of J. M. Douglass and others, under the laws of the state of Mis-

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ouri, for an indebtedness contracted while navigating the waters of that state; and that under an order of court in Missouri, the sheriff on the 22d of December, 1855, sold the said boat, with all her tackle, fixtures and furniture, to one Matthews, who is still the owner, and now defends this suit.

8. That the notice at the suit of Douglass and others, was limited to creditors having liens against said boat, under the laws of Missouri, which laws precluded non-resident creditors, or those having debts contracted out of said state. Upon these facts, it was held, that plaintiffs were not parties to the proceeding under which the boat was sold; and that it was not thereby discharged from the lien given to them for the supplies furnished, under the laws of this state. Judgment accordingly for plaintiff, and defendant appeals.

Edwards & Turner, for the appellant, cited the following authorities: *Steamboat Champion v. Jantzer*, 16 Ohio, 91; *Goodsill v. Brig St. Louis*, 16 Ib. 178; *Schooner Aurora Borealis v. Dobbie*, 17 Ib. 125; *Kellogg et al. v. Brennan et al.*, 14 Ib. 72; *Jones and Watkins v. Steamboat Commerce*, 14 Ohio, 408; *Provost et al. v. Wilcox et al.*, 17 Ib. 359; *Dobbys v. Sheriff of St. Louis County*, 5 Missouri, 256; *Steamboat General Brady v. Buckley & Randolph*, 6 Ib. 558; *Steamboat Rover v. Stiles*, 5 Blackf. 483; *Pulliam, Ex. v. Osborne, Adm'r*, 17 Howard, 471; 11 B. Monr. 25; *Drake on Att'ch.* § 265; 1 B. Monr. 313; 6 U. S. Cond. 506; *Thompson v. Steamboat Morton*, 2 Warden, 26.

Rankin, Miller & Enster, and *George W. McCrary*, for the appellee, cited the following: Code, § 2116; Swan's Stat. 207; 1 Howard, 811; 9 Ib. 69; *Sigler v. Woods*, 1 Iowa, 177; *Noble v. Steamboat St. Anthony*, 12 Mo. 252; 18 Ib. 587; *Twitchel v. Steamboat Missouri*, 12 Ib. 412; *The Mary*, 8 U. S. Cond. 335.

WRIGHT, C. J.—By the Code, (ch. 120,) the claim of the plaintiffs was a lien upon this boat, taking preference of any and all claims against the same, or any of her owners, growing out of any other causes than in said chapter are enu-

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merated. The material question in the case is, whether the seizure and sale of the boat, under the laws of Missouri, operated to divest or destroy this lien? We think not. Plaintiffs had one year within which to bring their suit against the boat, and for that length of time their lien continued. Before the expiration of the year, the now owner of the boat purchased under the sale in Missouri. Whether the proceedings there instituted, were against the former owners of the boat, or against the boat itself, does not appear from the facts found by the court below. If against the owners, it is very clear that the lien of the plaintiffs, under and by virtue of the laws of this state, would not be destroyed. See *Steamboat Seabird v. Bechler*, 12 Mo. 568. If against the boat itself, to enforce liens, given to parties, under the laws of the state of Missouri, the effect of such sale upon the lien of plaintiffs, under our law, would present a more doubtful question for our determination. And if by the laws of Missouri, at the time this proceeding was had, the lien or claim of plaintiffs could have been there enforced against the boat, the claim of the present owner would have been still stronger. The courts of that state, however, have held repeatedly that their "act concerning boats and vessels," and the one under which this boat was sold, "was designed to afford a speedy and convenient remedy to our (their) own citizens, and to such others only, as are engaged in trade within our (their) jurisdiction, at the time of their contracts." *Noble v. S. B. St. Anthony*, 12 Mo. 263; *Ib.* 412; *S. B. Rariton v. Pollard*, 10 Mo. 583. See also *Champion v. Jantzen*, 16 Ohio, 90; *Goodsill v. Brig St. Louis*, *Ib.* 178. If, then, the plaintiffs would not have been permitted to enforce their lien, though urged at the time of said seizure and sale, it would be a virtual mockery of justice, to say that they are bound by such proceedings. And not being bound, it seems to us there can be but little ground for saying, that the purchaser took the boat freed from plaintiffs' lien. All persons having liens which could be enforced, might be bound by the seizure and sale, and the present owner might hold the boat, without being subject to such

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liens. Not so, however, as to those liens which, having a valid existence under our laws, at the time of his purchase, could not, within the jurisdiction of such purchase, be enforced. He might take the boat freed from the liens in Missouri, but not from those in this state. We cannot concur in the position, that the rules which obtain in maritime proceedings, apply in this. The proceedings under the maritime law for the sale of a libeled vessel, are strictly *in rem*. Such sales are for the benefit of all persons interested, and not for the benefit alone of those in a particular locality or jurisdiction. All are bound, for *all* having claims may, within a specified time, come forward and establish their claims. In this case, however, the proceedings in Missouri, included and bound only those within that jurisdiction; none others could establish their claims and demand a *pro rata* distribution. The distinction, we think, is quite manifest. The position of appellant, that the petition of plaintiffs does not show that this suit was commenced within one year after the supplies were furnished, is most clearly based upon a mistaken view of the record. The averment is very distinctly made.

Judgment affirmed.

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In actions *ex contractu*, as well as in those *ex delicto*, the plaintiff may enter a *nolle prosequi* as to a part of the defendants, when they sever in their pleas, and plead matter going to their personal discharge.

So, when they simply sever in their pleas, without looking at the matter of the plea.

In an action on an implied assumpsit against several defendants, a *nolle prosequi* as to a part of the defendants, is not regarded as a *retraxit* or release, and therefore, it does not operate to discharge the other defendants.

Where in an action against several defendants, for money had and received for the use of the plaintiff, the defendants severed in their pleas, each pleading matter going to his separate discharge; and where on the trial, after some testimony had been given to the jury, the plaintiff entered a *nolle*

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prosequi as to all the defendants, except one; and where the court, on motion of the remaining defendant, held that the *nolle prosequi* operated to dismiss the action as to the remaining defendant also, and the action was dismissed; *Held*, That the court erred in dismissing the action.

Appeal from the Dubuque District Court.

THE plaintiff sued the defendants for money had and received to his use. The defendants severed in their pleas, each pleading matter pertaining to himself alone. Rogers denied having received money to the use of plaintiff; answering, however, that Booth, (of the firm of Barney & Co.), requested him to deliver certain moneys to Merritt, which he took and so delivered. Barney & Co. answer that plaintiff authorized Booth, one of the firm, to receive certain money coming to plaintiff, from the United States, on a surveying contract, and pay it to certain persons, among whom was Merritt, and that Booth received it, and so paid it. Merritt answers that he received the money, and claims that he had a right to receive it, and also to hold it to his own use, upon grounds which are set forth. On the trial, some testimony having been given before the jury, the plaintiff entered a *nolle prosequi* as to all the defendants, except Merritt, whereupon, on motion of the counsel of Merritt, the court held that this *nolle prosequi* operated to dismiss the action, as to the remaining defendant also. From this decision, the plaintiff appeals.

Smith, McKinlay & Poor, for the appellant.

J. Burt and Samuels & Cooley, for the appellee.

WOODWARD, J.—In actions *ex contractu*, as well as in those *ex delicto*, the plaintiff may enter a *nolle prosequi* as to part of the defendants, when they sever in their pleas, and plead matter going to their *personal* discharge. 1 Saund. 207, a, b; *Noke v. Ingham*, 1 Wils. 89, and see 3 Esp. 77, S. C.; Jac. L. Dict. title *Nol. Pros.* And this is probably so, when they simply sever in their pleas, without look-

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ing at the matter of the plea. Saund. *ut. sup.* There is no assumpsit in the present case, except as implied by the law; at least it may be so, for the action may be founded on a wrong, but waiving the *tort*. The entering a *nolle prosequi* is not regarded as a *retraxit* or a release, and therefore, it does not operate upon the others. In those cases where it cannot be done, it stands upon other reasons. The court should have permitted the plaintiff to proceed against the remaining defendant.

The judgment is reversed.

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Time is sufficiently alleged in an indictment, by an allegation that the offence was committed "on or about" a day therein named.

A battery is only an aggravation of an assault; when the assault is charged to have been made with a dangerous weapon, it is a still further aggravation; and where it is charged to have been made, with intent to commit a great bodily injury, it is only an offence in a different degree.

The assault is still the original offence; and the means—the intent—and the extent to which it is carried—qualify only the aggravation of this original offence, to which additional punishment is often affixed by the statute.

An indictment is not double, because an assault is described with additional incidents of aggravation.

Where an indictment charged that the defendant, "on or about the 9th day of June, 1856," "committed an assault and battery upon the person of H. with intent to inflict on the person of H. a great bodily injury;" *Held*, 1. That time was sufficiently alleged in the indictment; 2. That the indictment did not charge two distinct offences.

A party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination.

When a question is put to a witness, which is collateral and irrelevant to the issue, his answer cannot be contradicted by the party who asked the question, but it is conclusive against him.

Where on the trial of an indictment for an assault, it was shown by the testimony of H, the person assaulted, that he went with, and at the request of a constable, to the house of the defendant, to levy an execution on his property; that they went to the stable, and the constable opened the door, went in, and levied on two mules; that H. went into the stable with him; and that while there, the assault was committed; and where the defendant, on cross-examination, asked H. whether, when the constable attempted to

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take the mules from the stable, the defendant did not claim, that they were his plow team, and as such, exempt from execution, and whether he did not offer to the constable other property to levy upon, sufficient to satisfy the execution? to which an objection was sustained by the court; *Held*, That the evidence was properly excluded from the jury.

And where on the further cross examination of H., he was asked, whether the wife of defendant, did not request the constable and H. not to levy on the mules, but to levy on other property, which the witness answered, stating that the wife opposed the levy on the mules, but did not tell them that they might levy on other property, and made no request to that effect; and where the defendant then introduced his wife as a witness, and offered to prove by her, that she had made such request, to which an objection was sustained; *Held*, That the ruling of the court was correct.

Where on the trial of an indictment for an assault, after the state had proven that the party assaulted went to the house of defendant, to assist a constable in levying an execution on his property, the defendant offered to prove that the property levied on was exempt from execution, and that he requested them to levy on other property, which evidence was excluded from the jury; *Held*, That the evidence was properly excluded.

And where in such a case, after the defendant had asked the prosecuting witness, on cross-examination, whether he struck the wife of defendant, and used abusive language to her, the defendant proposed to show by his wife, that said witness had used abusive language to, and struck her, which evidence was intended to impeach the witness; and where the court held, that the wife might state whether said witness struck her, but should testify not as to the abusive language; *Held*, That the ruling of the court was correct.

Error to the Mahaska District Court.

INDICTMENT for assault and battery, with intent to commit great bodily injury to one C. C. How. A motion to set aside the indictment, and a demurrer to the same, were overruled by the court. The defendant, (plaintiff in error), then pleaded not guilty, and on the trial, exception was taken to the ruling of the court, in refusing to suffer a witness for the State to answer certain questions on cross-examination, and in sustaining the objection made by the State to the introduction of certain testimony offered by defendant. The defendant was found guilty of an assault, and fined \$25.00. To the judgment of the court, he now prosecutes this writ of error.

Crookham & Fisher, for the plaintiff in error.

S. A. Rice, (Attorney-General,) for the State.

STOCKTON, J.—The questions raised by the demurrer, are: 1. Whether it is sufficient to allege in the indictment, that the offence was committed “on or about the 9th day of June, 1856.” We are of opinion that it is sufficient. It is provided by the Code, (§ 2916,) that “no indictment shall be quashed, or judgment thereon arrested or deemed invalid, if it can be understood that the offence was committed at some time prior to the finding of the indictment.” Wharton’s Crim. Law, 162.

2. It is alleged that the indictment is double, in charging the defendant with two offences punishable by statute in a different manner. The indictment charges that the defendant, (plaintiff in error), “committed an assault and battery upon the person of C. C. How, with intent to inflict upon the person of said How, a great bodily injury.” The offence is charged in different forms, in four different counts of the indictment. This is allowable upon precedent and authority, and is authorized by section 2917 of the Code. A battery is only an aggravation of the assault, and when the assault is charged to have been made with a dangerous weapon, it is a still further aggravation; and where it is charged to have been made with an intention to commit great bodily injury, it is only an offence in a different degree. The assault is still the original offence, and the means—the intent—and the extent to which it is carried—qualify only the aggravation of this original offence, to which additional punishment is often affixed by the statute, which admits that the defendant may be convicted of the offence in a degree lower than that charged in the indictment. But it cannot be said that the indictment is double, because the assault is described with additional incident of aggravation.

3. It was shown by the testimony of How, the person assaulted, that he went with, and at the request of a constable, to the house of Cokely, the defendant, to levy an execution on his property; that they went to the stable, and

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the constable opened the stable door, went in and levied on two mules, and that How went into the stable with him, and while there the assault charged in the indictment was committed. The defendant, Cokely, asked the witness whether, when the constable attempted to take the mules from the stable, he (Cokely) claimed that they were his plow team, and as such exempt from execution, and whether he offered to the constable other property to levy upon, sufficient to satisfy the execution. The State objected to the evidence, and the court sustained the objection. We think the evidence was properly excluded. The fact that the constable had levied upon property claimed to be exempt from seizure on execution, was no justification for the assault on How. The question, too, was asked the witness on his cross-examination, and it is well settled that a party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him as such, in the subsequent progress of the cause. 1 Greenleaf's Evidence, §§ 445, 449.

4. The subject was, however, continued, and the witness How, was asked on his further cross-examination, whether Hannah Cokely wife of defendant, did not request the constable and How, not to levy on the mules, as they were her husband's only plow team, but to levy on other property. The question not being further objected to, the witness answered that Mrs. Cokely opposed the levy on the mules, but did not tell them that they might levy on other property, and made no request to that effect. The defendant, Cokely, then introduced his wife as a witness, and offered to prove by her, that she had made such request to the constable and How, the witness, at the time they levied on the mules. The State objected to the testimony, and the evidence was held by the court to be inadmissible. There was no error in this ruling of the court. The question to How, on his cross-examination, was collateral and irrelevant to the issue. It might well have been objected to by the State, and

should have been ruled out by the court. When a question is put to a witness, which is collateral and irrelevant to the issue, his answer cannot be contradicted by the party who asked the question, but it is conclusive against him. 1 Greenleaf Ev. § 449.

5. The defendant (Cokely) then offered to prove that he claimed to the constable and How, that the mules levied on were his plow team, and as such, exempt from execution, and that he requested them to levy on other property. This evidence, the defendant averred, was offered to show that the constable and How, were trespassers in levying upon property exempt from seizure. The evidence was objected to by the State, and ruled out by the court as irrelevant. The evidence was properly excluded. If the property was exempt as claimed, that fact furnished no justification to defendant for his assault on How, the constable's assistant. The legality of the levy was subject to be ascertained and determined by an appeal to the courts. The defendant had no right to take the law into his own hands, or to redress his own grievances by a resort to violence. The right to use force in defence of one's person and property, does not authorize a defendant in execution to resist forcibly the officer in the discharge of his duty.

6. The defendant then proposed to show by Mrs. Cokely, his wife, that the witness How, while in the stable, used abusive language to, and struck defendant's wife. The avowed purpose of the testimony was to impeach the credibility of How, and to justify the defendant in the use of sufficient force to prevent How from injuring his wife. The testimony was objected to by the State, and the court held that the witness might state whether How struck her, but should not state whether he had used abusive language to her. The ruling of the court was correct. The witness How, was asked in his cross-examination by the defendant, whether he struck Mrs. Cokely, and used abusive language to her. So far as the matter of the abusive language is concerned, the defendant was bound by the answer of How, and could not contradict him. 1 Greenleaf's Ev. §§ 449,

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445. So also was the defendant concluded by the answer of How, to the question "who opened the stable door?" He could not afterwards contradict the answer of How, upon that point.

Judgment affirmed.

LEFFLER v. ARMSTRONG.

It is not necessary to the validity of a trust deed or mortgage, containing a provision, authorizing the grantee to sell the premises, on breach of certain conditions specified therein, that the grantee should join in its execution, or sign and acknowledge the same; or that he should signify his willingness to make the sale, or undertake the execution of the power, by any formal writing indorsed on the deed.

Under such a conveyance, the grantee, upon breach of the conditions, may foreclose by sale, without the aid of a court.

Where a deed of trust or mortgage authorizes the grantees to sell the premises, upon breach of the conditions contained in the conveyance, first giving thirty days' notice of the time and place of sale, a publication of the notice of sale for five successive weeks in a newspaper—thirty days having elapsed between the first publication and the day of sale—is sufficient notice.

Where in a proceeding in equity to redeem certain real estate sold under a deed of trust, or mortgage, containing a power of sale, it appeared, that I. L. being indebted to C., the said I. L. and one J. L. to secure the said debt, on the 25th day of October, 1842, executed a conveyance of real estate, to P. & C., which deed provided that upon the failure of said grantors to make payment according to the terms of the deed, the said P. & C. were empowered to sell said premises to the highest bidder for cash, "first giving thirty days' public notice of the time, place, and terms of sale, and of the property to be sold, by advertisement in some newspaper printed in Burlington, Iowa Territory," and which deed also contained the following clause: "And the said parties of the second part, (P. & C.) covenant faithfully to perform and fulfill the trust herein created. In witness whereof, the said parties have hereunto set their hands and seals, the day and year above written," which deed was signed and acknowledged by the grantors, but not by the said trustees; and where on the 8th day of May, 1847, default having been made in the payment of said debt, the trustees sold the land to the respondent, and in July, 1848, executed and delivered to him a deed for the same—notice of which sale was given by publication in a newspaper, printed in Burlington, which publications were made on the 8th, 15th, 22d, and 29th of April, and on the 6th of May, 1847; and where on the 26th day of Septem-

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ber, 1855, the complainants applied to respondent to redeem said real estate, and tendered him his purchase money and interest, which was declined by the said respondent; and where, upon the hearing, the petition of the complainants was dismissed; *Held*, 1. That it was not necessary for the trustees to become a party to the conveyance; 2. That the notice of sale was sufficient, and the sale valid; 3. That the bill was properly dismissed.

Appeal from the Des Moines District Court.

ON the 25th day of October, 1842, Isaac Leffler was indebted to one Cox, in about the sum of \$885, and on that day he and John Leffler, to secure said sum, executed a deed of trust to William H. Postlewait and James Creegan. The parts of said deed material to the present controversy, are as follows: Upon the failure of the grantees to make payment according to the terms of said deed, the said trustees were given power to sell the real estate therein described, to the highest bidder, for cash, "first giving thirty days' public notice of the time, place and terms of said sale, and of the property to be sold, by advertisement in some newspaper printed in Burlington, Iowa Territory." "And the said parties of the second part, (Postlewait & Creegan,) covenant faithfully to perform and fulfill the trust herein created. In witness whereof, the said parties have hereunto set their hands and seals, the day and year first above written." Said deed is signed by the grantors, but not by the trustees therein named. The certificate of acknowledgment sets forth that the Lefflers and Postlewait appeared before the magistrate, but it is not claimed that either he or Creegan signed the deed. In April, 1843, Cox assigned said deed of trust, or his interest therein, to one Lazier, and in November, 1845, the said trustees by writing indorsed on said deed, in consideration of the payment of three hundred dollars on the trust debt, released a portion of the real estate described therein to said Isaac Leffler. On the 8th of May, 1847, default having been made in the payment of the balance of said debt, the trustees sold the lands to respondent Armstrong, and in July, 1848, executed and delivered to him a deed for the same. Notice of said sale was given

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by publication in a newspaper, printed in Burlington, as follows: the *first* publication was on the 8th of April, 1847; the *second*, on the 15th; the *third*, on the 22d; the *fourth*, on the 29th; and the *fifth*, on the 6th of May. On the 26th of September, 1855, the petitioners applied to respondent to redeem said real estate, and tendered him his purchase money and interest. Respondent declined to receive the same, and thereupon, in October of the same year, this bill was filed, praying, for causes therein stated, that petitioners be permitted to redeem said lands, and that Armstrong be required to release to them the said premises. The cause was heard on bill, answer, replication, and exhibits—the bill dismissed at complainants' costs, and they now appeal.

D. Rorer and J. C. & B. J. Hall, for the appellants.

C. Ben. Darwin, for the appellee.

WRIGHT, C. J.—To entitle themselves to the relief asked, and to reverse the decree below, complainants rely principally upon two grounds. The first is, that it was the intention of the grantors, and the parties to said deed, that the trustees should sign and acknowledge the same; that it never was, therefore, properly executed and delivered, but was received by the trustees, or by Postlewait & Creegan as an escrow; and that never having accepted the trust, they had no power to make the sale. In the second place, it is insisted that notice of said sale was not given as required by the terms of the deed.

In the statement of the case, and thus far in this opinion, the instrument executed by complainants is spoken of as a deed of trust. Counsel for complainants so treat it, adding, however, the further argument that if a mortgage, and not a deed of trust, then the persons named therein as trustees could not foreclose by sale without the aid of a court; that such sale was extra-judicial, could confer no title, and that at most the purchaser holds the property in trust for them. We deem it entirely unnecessary in deter-

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mining the rights of the parties in this case, to inquire whether this instrument as a deed of trust, was ever properly executed and delivered, or whether, if such deed, it was necessary to the perfection of respondent's title, that the acceptance of the trust should have been indorsed thereon by the supposed trustees. We have no hesitation in saying, that as a mortgage containing a power to sell in case of default of payment, it conferred ample power upon Postlewait & Creegan to make the sale—and that it was not necessary that they should join in the acknowledgment of said instrument, or its execution. That parties may legally insert a provision, conferring a power of sale upon the mortgagee or a third person, is no longer a matter of doubt. Such mortgagee or third person, upon breach of the condition of the mortgage, is bound to fairly and judiciously dispose of the property, pay the debt from the proceeds, and account with the mortgagor for the balance. And we know of no rule that requires the mortgagee or third person, where the power of sale is inserted in the mortgage deed, to join in the execution, to sign or acknowledge the same, or to signify his willingness to make the sale, or undertake the execution of the power, by any formal writing indorsed on the deed. 1 Hilliard on Mortgages, ch. 7, p. 90; 4 Kent, 146. In this case the power was given to third persons, nothing is shown to impeach the fairness of the sale, and we are quite clear that the deed itself fully empowered them to foreclose by sale, without the aid of a court.

The second and only remaining question is, whether the notice given was such as was required by terms of the deed. And we are clearly of the opinion that it was. It is not denied but that more than thirty days intervened between the first publication of the notice and the day of sale. Nor is it claimed that the notice was not published regularly in each issue of the paper for five successive times. But it is said that the last issue or publication was on the 28th day after the first one, and that thirty days' notice was not, therefore, given as required by the deed, or in other words, that while the publication may have been continuous from one

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publication day to another, or from the *first* to the *last* day of its insertion, yet *after* the last publication it was out of the paper, or ceased to be *in* the paper or continuous, and finally that thirty days should have intervened between the *first* and *last* publication. If the first or any subsequent publication of the notice prior to the last, continued from one publication of the notice prior to the last, continued from one publication day to another, or operated as a continuous notice from week to week, then we must acknowledge that we cannot see why the last publication would not have the same effect. The notice as much continued to be *in* the *last* issue after the day of its publication, as it continued in the first one. The public was as much advised thereby, not only on the day of its publication, but for subsequent days, that there would be a sale, as by any of the previous issues. If the issue of the paper could give no notice of the sale beyond the day of its publication, then there was but five days' notice. But it is conceded in the argument, that each publication was notice for the term between one regular issue and another—and as a consequence, that there was as perfect a notice on the 9th or 24th of April, as on the 8th or 22d, or on any other of the publication days. If so, then why was not the publication on the 6th of May, notice for the term intervening between that and the 13th, the next day for publication? And if, being published on the 13th, there would have been thirty-six days' notice, why not thirty days as on the 8th of May? To our minds, it is conclusively clear, that if the notice continued to have life after the day of its first publication, until the second, and from the second to third, and a like manner to the last, so would the last publication continue in being until the day of sale.

But there is still another view of it presented by counsel for appellants, which has more weight, and that is that thirty days should have intervened between the first and last publication of the notice, and that it is not sufficient that thirty days intervened between the first publication and the day of sale. We say this has more weight than the position last examined, and yet we must say that but for

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the *dictum* forming it, found in *Armstrong et al. v. Scott et al.*, 8 G. Greene, 433, we should have had but little difficulty in holding the position untenable. In that case the terms of the trust deed with reference to the publication of notice were substantially, if not identically, the same as in the one before us. The trustees being about to sell the property, the grantors filed their bill to enjoin the sale. It seems that but one publication was made, which was more than thirty days before the proposed day of sale, and the question was, whether this was sufficient. It was held that such notice should not only be published thirty days before the sale, but it should have been continued; that it was indispensable that the publication should be continued, as that the required time should elapse; and that there being but one publication, and no more, there was no more power in the trustees to sell, than if there had been no publication. And having thus decided fully, and as we think most correctly, the very point, and the only point, that could or did legitimately arise on this part of the case, the opinion concludes with this *dictum*, "thirty days should have elapsed between the first and last publication, as upon giving this notice depended his (the trustee's) power to sell." In holding as we feel constrained to do, adverse to this position, we do not regard that we overrule the *decision* made in that case—for it was entirely unnecessary for the court to announce any opinion, upon any other question than the simple one whether one publication was sufficient. Beyond this, all that was said was *obiter dicta*, and if such general *dicta* can in any case be regarded as establishing the law, then truly has it been said "that nothing is yet settled, or can long be settled." *Frantz v. Brown*, 17 S. & R. 292.

The publication was made regularly every week, there was no omission. The notice, as we have before substantially said, was circulating, and being published to the public and the world in legal contemplation, as much and effectively on each day, hour and minute after one publication, and before the succeeding one, as it was at the instant of time when the paper was issued or delivered to its readers.

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And yet it would not do to hold that *one* publication, thirty days prior to the sale, would be sufficient; for the language used, as well as reason and good sense, would dictate a continuous or successive publication—in those modes of repetition which the subject matter would allow. And, therefore, in this case (there being no charge or pretence that a daily paper was then issued in Burlington,) it is only necessary to say that successive publications in the weekly issue were required, and if this requirement was not the law, and the contract of the parties were thus far complied with, being thus published, and thus imparting notice to the public for every day and hour intervening between each publication, so after the last issue, and on the day of sale, the notice was as positive, as clear, and as sufficient for all practical purposes, as it had been for any minute of time subsequent to the first insertion.

Let us state the argument categorically thus: Was the "advertisement," spoken of in the deed, in the newspaper on any other days than the days of publication? This is admitted, and could not well be denied. If so, was it not as practically in the paper for six days of each week as it was on the seventh, or the publication day? That is to say, was the notice any more given to the public on the seventh than on the six days? Did the parties contemplate the mere setting up of the notice, and striking of it off in the paper, or was the circulation of such paper and reading of it by the public, the leading purpose and object of the advertisement? Was not the *publication* of the fact of sale what was designed? What do we understand by such publication, other than a notification to the people at large by printing and circulating the same in the paper? And if such publication operated as a notice on the days on which the paper was *not* published, why did not such notice continue *after* the last issue of the paper, to the day of sale, such sale having taken place prior to the next publication day? If every day, subsequent to the first, and prior to the last issue, was a day of *notice*—if up to the sixth of May (the date of the last issue,) there was *twenty-nine days* "pub-

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lic notice of the time, terms and place of sale, and of the property to be sold by advertisement in some (a) newspaper printed in Burlington, then why were not the 7th and 8th of May *notice* days, and why did not the last issue give public notice on those days of the sale, as effectually as did any previous publication for any day subsequent to the issue? What legal or logical consistency is there in saying that for all the days *prior* to the last issue, there was notice—but after that time there was no notice beyond the minute or the day that the paper was issued? And if public *notice* was what the parties designed—and if such notice is given by the contemplated circulation and reading of the paper, and not merely by taking the impression from the type in the printing office—why is there not as much thirty days' notice, if that length of time intervenes between the first publication and the day of sale, as where it intervenes between the *first* and *last* publication? To our minds there can be but one correct answer to this last question. And the error of any other view arises from this fact, that the notice is treated as being given or imparted on the day of and by the printing of the paper only, and not upon the days when it is being circulated and read, and by such circulation and reading. And we conclude, therefore, that the notice in this case, having been published successively in the newspaper, and thirty days having elapsed between the first publication and the day of sale, such notice was sufficient, and the title of the purchaser is not invalidated for any supposed irregularity in this respect.

In conclusion, we may say, that the cases of *Dutty v. Zeigler*, and *Temple v. Cassens*, 1 G. Greene, 164 and 192, cited by appellants, do not decide any question arising in this case. In *Early v. Doe*, 16 How. 641, relied upon, the length of time required by the law, had not elapsed between the first publication and the day of sale, but it is nowhere intimated in that case that such length of time should have elapsed between the first and last publication. On the contrary, while the question did not directly arise, it is almost assumed as true, that the rule would have been good, if the

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required length of time had passed from the date of the first advertisement to the day of sale. But without further extending this opinion by citations from that case, it is sufficient to say that it contains nothing in conflict with the views here expressed.

Decree affirmed.

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BACON v. LEE AND GRAY.

Where usury is pleaded as a defence, and the plaintiff is called upon to reply under oath, as to the usury, such sworn replication does not render the defendant incompetent to testify as to the usury.

Where in an action to foreclose a mortgage, executed to secure the payment of two promissory notes, brought by the indorsee of the notes against the makers, the defendants pleaded usury, and called upon the plaintiff to reply under oath, as to the time of the transfer of the notes, and the consideration of such transfer, which he did; and where on the trial, one of the defendants was offered as a witness, to prove the usurious consideration of the notes, to which the plaintiff objected, but the objection was overruled, and the defendant permitted to testify; *Held*, That the witness was properly admitted to testify.

A penalty provided by statute against an act, renders the act illegal, though not expressly prohibited. The penalty amounts to a prohibition.

While the act to regulate interest on money, passed in 1853, does not expressly declare that the usurious contract shall be wholly void, the same end is reached, and the same effect is given to its provisions, by declaring that in *no case*, where unlawful interest shall be contracted for, shall the plaintiff, in a suit brought upon the contract, have judgment for more than the principal sum loaned.

Usury may be pleaded in an action on the usurious contract, when brought in the name of an indorsee, or innocent, *bona fide* holder.

When the answer or replication of a party, is required to be made under oath, as to any matter stated in the previous pleadings, and responsive to it, such answer or replication is evidence conclusive, in favor of the party making the same, as to the matters of fact about which the opposite party seeks a disclosure, unless it is overcome by the testimony of two witnesses, or by one witness, corroborated by other circumstances and facts, which give to such testimony a greater weight than such answer or replication, or which are equivalent in weight to one witness.

A replication under oath, which neither admits nor denies the facts stated in

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the pleading to which it is a reply, and in which the party making it, alleges that he possesses no knowledge, and has no means of knowledge, as to such facts, and calls upon the opposing party to prove the facts stated in the answer, is no testimony upon the facts in controversy, and cannot have the same effect as the testimony of a witness.

A replication under oath to matter stated in the answer, as to which no such reply was called for, is not evidence for the party making such replication.

Appeal from the Dubuque District Court.

PETITION in Chancery to foreclose a mortgage given by defendants, to secure the payment of two notes, one dated February 25th, 1855, and the second, dated May 8d, 1855, each for the sum of \$1,250, and payable in one year from date, to N. W. Capwell, and indorsed to plaintiff, February 12th, 1856. The defence was usury. The defendants admitted the making of the notes, and the execution of the mortgage to secure their payment, and aver that Capwell, the payee, lent and advanced to the defendants two thousand dollars—for the loan and forbearance of which, he was to receive interest at the rate of twenty-five per centum per annum, and for the payment of said sum of money, with interest after the rate aforesaid, the notes were given. They require the plaintiff to reply under oath to their answer, and to state whether the notes were or were not transferred to him in good faith; whether he was aware at the time he received them, that they were given upon a usurious consideration; and whether or not the transfer to him was made in order that suit might be brought in his name as assignee, to prevent defendant from making his defence; and also to state the time and place when and where the transfer was made, and the consideration paid by him. The plaintiff replied under oath, and denied all knowledge of the alleged usury; that the notes were purchased by him for a good and valuable consideration paid, in good faith, and without any knowledge or suspicion, that there was an agreement for the payment of usury between the payee and makers; and that the amount paid by him to Capwell for

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the notes was the sum of \$2,463.54, at Rockford, Illinois, on the 12th February, 1856, when the indorsement was made. On the trial, Lee, one of the defendants, was offered as a witness, to prove the usurious consideration of the notes sued on. The plaintiff objected to his being sworn as a witness. The objection was overruled by the court, and Lee permitted to testify. Judgment was rendered for the plaintiff for \$2,000, the principal sum loaned, without either interest or costs. Plaintiff appeals, and assigns the following errors :

1. The court erred in allowing Lee to testify in relation to the usury.

2. The court erred in allowing any defence of the nature of usury to be set up in this cause.

3. The court erred in finding the contract usurious between the original parties, on the testimony of only one witness, over the sworn replication of the plaintiff.

4. The court erred in holding the law of 1853, applicable to commercial paper, in the hands of an innocent holder.

Samuels & Cooley and F. E. Bissell, for the appellant.

Wiltse & Blatchley, for the appellees.

STOCKTON, J.—The first question raised by the assignment of errors, is, whether the defendant Lee was properly admitted by the court to testify as a witness to the usurious consideration of the notes sued on. The statute enacts that "in all cases where the unlawful interest is not apparent on the contract or writing, the person contracting the unlawful interest, shall be a competent witness to prove that the contract is usurious." Acts 1853, ch. 37, § 5, 68. It is claimed by plaintiff, that Lee had been rendered incompetent as a witness, by defendants' having made a witness of plaintiff, and calling on him to reply under oath to their answer. To this, the answer is, that the statute makes him a competent witness, and we see no reason why his having previously made a witness of plaintiff, can so far change the meaning of the law, or the relations of the par-

ties, as to render him incompetent, who was competent before.

It is secondly assigned for error, that the District Court permitted the consideration of the notes sued on, to be inquired into by defendants, to defeat the right of plaintiff to recover on them, as a *bona fide* holder, for a valuable consideration, without notice. The rights of the parties are to be determined wholly by the statute of 1853, ch. 37, 67, Section 5 is as follows: "If it shall be ascertained in any suit brought on any contract, that a rate of interest has been contracted for, greater than is authorized by this act, either directly or indirectly, in money, property, or other valuable thing, the same shall work a forfeiture of ten per centum per annum, upon the amount of such contract, to the school fund of the county in which the suit is brought, and the plaintiff shall have judgment for the principal sum, without either interest or costs. And in no case where unlawful interest is contracted for, shall the plaintiff have judgment for more than the principal sum, whether the unlawful interest be incorporated with the principal or not." The act fixes the rate of interest at six per centum per annum, unless the parties agree in writing to a higher rate, which may not be more than ten per centum. It forbids the taking a greater rate of interest than is in the act prescribed.

Where a statute against usury provides, that the usurious contract is void, then no subsequent circumstances can make the original contract good; and a promissory negotiable note, void at its inception for usury, is equally void in the hands of an innocent indorsee. 2 Parsons on Contracts, 384. The total or partial want, or failure of consideration, or illegality of consideration, is a good defence or bar to an action between any of the immediate or original parties to the contract. So it is, to any derivative title under the payee, by a person acting merely as his agent, or who has paid no value for the note. The same rule applies, where the party takes the note even for value, after maturity; or if he takes it with notice, at the time of purchase, that the note is void in the hands of the party from whom he pur-

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chases it, either for fraud or want, or failure, or illegality of consideration, he takes it subject to the same equities. If there is a partial want or failure of consideration, the note is avoided only *pro tanto*; where the consideration is illegal, the note is avoided *in toto*. But the total or partial want, or failure of consideration, between the original parties, is no defence or bar to the title or right to recover, of a *bona fide* holder of a note, for a valuable consideration, without notice. The law in such case does not permit the consideration to be inquired into. And where the note is founded on an illegal consideration, the same rule applies generally, whether the illegality be founded on moral turpitude, which is *malum in se*, or on a prohibition by statute, or *malum prohibitum*. The exception to this general rule is, where the statute creating the prohibition, at the same time, either expressly, or by necessary implication, makes void the instrument in the hands of the holder, whether he has notice of the illegality or not. Story on Prom. Notes, §§ 191, 192; Parsons on Mercantile Law, 257; 1 Pars. on Contracts, 381. It is otherwise, if the statute does not declare the contract void for the usury. Parsons on Mer. Law, 257, note. As between the original contracting parties, it is sufficient if the consideration be illegal in part, whether by statute or common law. Such illegality extends to the whole consideration, and the whole contract is void. If the consideration be illegal, it is insufficient to support a promise. A penalty provided by statute against an act, renders the act illegal, though not expressly prohibited. The penalty amounts to a prohibition. 1 Parsons on Contracts, 381.

Now, our statutes enacts, as a penalty, in case of any contract for a greater rate of interest than is therein allowed, a forfeiture of ten per centum per annum on the amount of the contract, against the defendant, and that the plaintiff shall have judgment for the principal sum loaned, without interest or costs. This provision is expressly extended to *all suits* brought on the contract affected by the usury. The statute does not expressly declare that the contract shall be wholly void. But the same end is reached, and the same

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effect is given to its provisions, by declaring that *in no case* where unlawful interest shall be contracted for, shall the plaintiff, in a suit brought upon the contract, have judgment for more than the principal sum loaned. We are of opinion that this provision extends to the note, even in the hands of an innocent holder; and we are strengthened in this conclusion, by the language of the subsequent section, which provides that the proper *bona fide* assignee of any usurious contract, may recover against the usurer, the full amount of the consideration paid by him for such contract, deducting the amount of the judgment for the principal sum, recovered against the makers.

The only remaining question is, that arising on the third assignment of errors, in which it is objected, that the court found the contract usurious on the testimony of Lee, one of the defendants, against the sworn replication of plaintiff, denying all the matters averred in the answer touching the usury. We think this assignment of errors is founded on a misapprehension of the matter and substance of plaintiff's sworn replication. The usury charged, is not denied by the replication. He declares that he has no knowledge, and no means of knowledge of the terms of the contract, between the original parties, or of the rate of interest agreed upon between them; that he can neither admit nor deny the allegations of the petition, as to the usury charged; and that he calls upon the defendants to prove the same. We cannot give to this sworn replication, the same effect as to the testimony of a witness. It is not testimony at all upon the question of usury. *First*, because defendants did not call upon plaintiff to discover any fact in relation to the usurious contract; and, *secondly*, because the plaintiff in his replication, does not deny the fact of usury, but declares that he knows nothing on the subject. When the answer or replication of a party is required to be made upon oath, as to any matter stated in the previous pleadings, and responsive to it, such answer or replication is evidence conclusive, in favor of the party making the same, as to the matters of fact about which the opposite party seeks a disclosure from

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him, unless it is overcome by the satisfactory testimony of two opposing witnesses, or by one witness, corroborated by other circumstances and facts, which give to such testimony a greater weight than the opposite pleading, or which are equivalent in weight to a second witness. 2 Story's Equity, § 1528. In this instance, as to the fact of usury in the original contract, the replication was not required by, and is not responsive to, the defendants' answer.

We are of opinion that there was no error in the judgment of the District Court, and the same is affirmed.

THE STATE OF IOWA v. McCLOSKEY.

By answering over, a party waives his demurrer.

A recognizance in a criminal case, not capital, cannot operate as a *supertax* on writ of error, unless allowed by a judge of the Supreme Court, as provided by section 3090 of the Code; and without such order of allowance, the District Court, under section 3230, possesses no power to take such recognizance.

Section 3094 requires that the supreme judge ordering a stay of proceedings, shall make the order, and prescribe the conditions of the recognizance.

The recognizance, or a copy of it, should be returned to the Supreme Court, with the record of the case; and that court, where the cause is reversed and remanded, should make an order concerning the future action of the party charged, answering to the condition of his undertaking.

Where a *scire facias* on a recognizance alleged that one H. having been convicted under an indictment for defacing a school-house, was sentenced to pay a fine of one hundred dollars; that H. sued out a writ of error; that it was ordered that the defendant be held to bail in the sum of one hundred dollars, with sureties for an equal amount, for his appearance; that the defendant and one C. came into open court, with the said H., and each acknowledged themselves to owe and be indebted to the state of Iowa, &c.; that the condition of the recognizance was as follows: "Now, if the said H. shall sue out a writ of error to the Supreme Court, and prosecute the same to effect in said court, and obey the requisitions, order or judgment of the same, in the premises, then the above obligation to be void;" that the said judgment of the District Court was rendered, and it was ordered that further proceedings be had in the District Court, not inconsistent with the opinion of the Supreme Court; that a writ of *procedendo* issued accordingly, commanding further proceedings, as if no judgment had been rendered, or writ

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of error sued out; that afterwards, at the May term, 1855, the said H., though three times solemnly called, came not, and the court ordered, that his default in the premises be entered; and where the defendant answered, denying that H. had sued out a writ of error; and averring that there was no law authorizing the recognizance; that there was no requisition, order or judgment of the Supreme Court, that H. was called upon to obey; and that H. had performed the condition of his recognizance; and where on the trial, the State offered in evidence the writ of *procedendo*, which contained no special order in relation to H., but is in the usual form, which was all the evidence on the part of the State; and where the defendant proved by the clerk of the District Court, that there was no writ of error in that cause, on file in his office; and where, upon this evidence, the court found for the State, and rendered judgment against the defendant; *Held*, 1, That the *scire facias* did not allege, nor the evidence show any breach of the condition of the recognizance; 2. That the judgment below was erroneous.

Appeal from the Cedar District Court.

THIS was a *scire facias* on a recognizance or bail bond, with which a declaration was also filed. One Huston, being convicted under an indictment for defacing a school-house, the *scire facias* alleges that he sued out a writ of error, and gave a bail bond, as required by statute, with the defendant and one Cundiff as sureties. The defendant only is served with notice. The declaration recites, that Huston, being found guilty, and sentenced to pay a fine, and having sued out a writ of error, "it was ordered that the defendant be held to bail for one hundred dollars, with sureties for an equal amount, for his appearance; whereupon, on the above named day, (which was a day in term time), came into open court, William Y. Huston, Greenbury B. Cundiff, and David McCloskey, and acknowledged themselves each to owe and be indebted to the state of Iowa, in the sum of one hundred dollars, to be levied, &c. (Then follow proper recitals, and the condition is as follows): "Now, if the said Huston shall sue out a writ of error to the Supreme Court of Iowa, and prosecute the same to effect in said court, and obey the requisitions, order or judgment of the said Supreme Court, in the premises, then the above obligation to be void." The declaration then avers that the

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judgment of the District Court was reversed, and that it was ordered that farther proceedings be had in the District Court not inconsistent with the opinion of the Supreme Court, and that a writ of *procedendo* issue accordingly, and that such writ did issue, commanding further proceedings, "as if no judgment had been rendered, or writ of error had been sued out." The declaration farther alleges, that afterward, "at the May term, 1855, the defendant Huston, though three times solemnly called, came not, and the court ordered that his default in the premises be entered."

The defendant, McCloskey, demurred to the *scire facias*, for several causes, of which one was, that the recognizance, as set forth, was not authorized by law. This demurrer was overruled, and the defendant answered. The answer, 1. Denies that the defendant, Huston, sued out a writ of error; 2. Avers that there was no law authorizing the recognizance; 3. Avers that there was no requisition, order or judgment of the Supreme Court which Huston was called upon to obey; and 4. That the defendant had performed the condition of his recognizance.

By agreement, the cause was submitted to, and tried by the court. A bill of exceptions shows the proofs and the finding and ruling of the court. The bill states that the prosecution offered in evidence the writ of *procedendo*, issued from the Supreme Court, which is set forth and is in usual form, and contains no especial order in relation to the defendant Huston, which was all the evidence offered on the part of the State. The defendant proved, by the clerk of the District Court, that there was no writ of error, in that cause, in file in that court, and this was all the evidence in the cause. Whereupon, the court decided the issue for the State, and rendered judgment against the defendant McCloskey, who appeals.

James Grant, for the appellant.

John Huber, (Pros. Atty.) and *Saml. A. Rice*, (Atty. Genl.) for the State.

WOODWARD, J.—The error first assigned relates to the overruling defendant's demurrer to the *scire facias*, and states several grounds of error. As the defendant answered over, no reason is perceived why he does not fall within the common rule, which holds the pleading over as a waiver of the demurrer.

The other assignments relate to the trial and the rulings of the court thereupon. They are based upon the statements of the bill:

1. That there was no evidence that a writ of error had been sued out.

2. That no fact was proved, showing that the District Court had a right to take the recognizance.

3. That there was no proof of any order of the Supreme Court on Huston to appear at the District Court.

4. That therefore defendant Huston complied with his recognizance.

5. That there was no proof of a recognizance—none of a writ of error—none of a trial before the Supreme Court—and none of a disobedience to any of its requisitions.

This recognizance was, undoubtedly, designed to operate as a *supersedeas* with the writ of error under chapter 184 of the Code, but the case shows no order allowing the writ of error to operate as such, as provided in sections 3090 and 3091. Without this, it is doubted whether the District Court can take the obligation under section 3230, and, therefore, the question arises on the validity of the bond, which question is made by the defendant. There would seem to be but little room to doubt, in fact, since section 3091, requires that the *supersedeas* should be allowed by a judge of the Supreme Court. And we understand section 3094, to mean that this judge shall make the order letting the defendant to bail, and prescribing the condition of the recognizance, after which and in accordance with which, the District Court or its judge (as well as some other officers), may take the obligation. This bond, or a copy of it, should in all cases be returned to the Supreme Court with the record of the case, and that court should make an order

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concerning the defendant's future action, answering to the condition of his undertaking.

In the present case, there was no such order of that court shown, and consequently no breach of the condition. We do not regard the common order to the District Court to proceed as if there had been no trial, which is contained in the writ of *procedendo*, as equivalent to the order required upon the defendant. We are not prepared, however, to say, with defendant's counsel, that he would be entitled to special notice, if there were a proper order. Perhaps he would be required to take notice of it.

That part of the condition of the undertaking which requires the defendant to sue out a writ of error, is inappropriate, and properly forms no portion of the obligation intended by the law.

The counsel for the State have not laid, as a breach, a failure to prosecute the writ of error, but, on the contrary, their case shows that it was prosecuted. Neither have they claimed that to "prosecute to effect," means with success. On the whole, in our opinion, no breach of the condition of the obligation is alleged, and none is proven.

Some minor points are suggested by the prosecution, but none which are available, and it is not necessary to dwell upon them, since we have aimed to determine the cause upon the more substantial grounds.

The judgment of the District Court is reserved.

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MYERS v. SIMMS.

An order of the county court establishing a road, is not a matter affecting the rights of any person, as distinguished from the public; and no appeal is allowed by law, from such an order.

A writ of *certiorari* is the proper method of trying the regularity and validity of the proceedings of the county court in establishing a road.

Where the plaintiff and twenty-one other persons petitioned for the establishment of a road, and upon the coming in of the report of the commissioners

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appointed to examine as to its expediency, the defendant and twenty-nine other persons, remonstrated against its being established; and where the defendant claimed compensation for the damages he would sustain, if the road was opened, which were assessed by appraisers, and paid into court, for his use; and where the county court, after hearing the parties, ordered that the road be established and worked as other roads, from which order the defendant appealed; and where the District Court dismissed the appeal, on the ground that the defendant had no such interest in the subject matter of the order of the county court, as authorized him to take the appeal; *Held*, That the appeal was properly dismissed.

Appeal from the Mahaska District Court.

THIS was an appeal from the judgment of the District Court, dismissing an appeal from the county court of Mahaska county, establishing a road in said county. The plaintiff and twenty-one other persons presented the petition for the establishment of the road. On the coming in of the report of the commissioners appointed to examine as to its expediency, the defendant and twenty-nine other persons presented a remonstrance to the county court against its being established. The defendant, Simms, claimed compensation for the damages which he alleged that he would sustain if the road was established. His damages were assessed by appraisers and paid into court for his use. The county court on hearing the parties, and their proofs for and against the road, ordered that it be established, opened and worked as other county roads. From the order, Simms appealed to the District Court, in which court, the petitioners moved to dismiss the appeal, for the reason that the defendants had no such interest in the subject matter of the order of the county court, as authorized them to take the appeal. The District Court sustained the motion, and dismissed the appeal, and the errors assigned by the defendants are upon the judgment of dismissal.

Crookham & Fisher, for the appellant.

Wm. H. & J. A. Seevers, for the appellee.

STOCKTON, J.—The appeal in this case was from the order

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of the county court establishing the road, and not from the action of the appraisers fixing the amount of damages to be paid the defendant by reason of the road passing through his land. The questions arising upon the amount of the defendant's compensation, are not necessarily involved in the order of the court establishing the road, and an appeal from the latter order, if regular and proper, would not necessarily bring up the former with it for adjudication. An appeal is allowed from all orders and decisions of the county courts, on the merits of any matter affecting the rights of individuals as distinguished from the public, including intermediate orders involving the merits, and necessarily affecting the decree or decision. Code, § 131. If the defendant deemed that the county court, in establishing the road, had exceeded its jurisdiction, or was otherwise acting illegally, and desired to have its action in the premises reviewed in the District Court, a writ of *certiorari* to the county court, in the absence of any other plain, speedy and adequate remedy provided by law, would have been the proper method of trying the regularity and validity of the proceedings. See the opinion of this court in *Ball v. Humphreys*, June term, 1854. The order of the county court establishing the road upon the petition of plaintiff, was not a matter affecting the rights of the defendant as distinguished from the public, and no appeal was allowed by law from the order.

The order and judgment of the District Court dismissing the appeal is affirmed.

Judgment affirmed.

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CAPPS v. THE STATE OF IOWA.

In the case of a misdemeanor, where the fact charged in the indictment, appears to be unlawful, it is unnecessary to allege the act to have been unlawfully done.

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Such an averment is in no case essential, unless it be part of the description of the offence, as defined by statute.

An indictment which charges that the defendant "willfully obstructed the public road (describing it) contrary to law," sufficiently avers that the act charged was unlawfully done.

Where an indictment for obstructing a public road, described the road as follows: "The public road or highway leading from Fort Dodge to Fort Des Moines, Iowa, on the east side of the Des Moines river, lying and being in Boone township, Boone county, Iowa;" *Held*, That the road was sufficiently described in the indictment.

Error to the Boone District Court.

THIS was an indictment for obstructing a public road. The defendant demurred to the indictment for the following reasons:

1. That the road was not described with sufficient certainty.

2. That the indictment did not charge that the obstruction was placed in the road, either illegally or unlawfully.

The District Court overruled the demurrer, and the defendant sues out this writ of error. The road is described in the indictment, as "the public road or highway leading from Fort Dodge to Fort Des Moines, Iowa, on the east side of the Des Moines river, lying and being in Boone township, Boone county, Iowa."

J. E. Jewett, for the plaintiff in error.

S. A. Rice, (Atty. General,) for the State.

STOCKTON, J.—The description of the road was sufficient. The statute provides that "no indictment shall be quashed, if it can be understood that the offence was committed at some place within the jurisdiction of the court. Code, § 2916. The indictment charged that the defendant "willfully obstructed the public road, &c., contrary to the law." This is sufficient averment that the act charged was unlawfully done. In the case of misdemeanors, where the fact laid in the indictment appears to be unlawful, it is unneces-

McKell v. Wright, Evans & Co.

sary to allege it to have been unlawfully done. The averment is in no case essential unless it be part of the description of the offence as defined by some statute, for if the fact as stated be illegal, it would be superfluous to allege it to be unlawful. Starkie's Criminal Pleading, 85.

Judgment affirmed.

McKELL v. WRIGHT, EVANS & CO.

Lake /

Where a party fails to ~~trust~~ his exceptions to the ruling of the court, in refusing instructions, at the time of such refusal, it is too late to do so after verdict.

Where a party fails to except to the ruling of the court, in refusing instructions, at the time of such refusal, the appellate court will not inquire whether the instructions were improperly refused.

Appeal from the Des Moines District Court.

Browning & Tracy, for the appellants.

J. C. & B. J. Hall, for the appellee.

WRIGHT, C. J.—The error assigned in this case, refers to the overruling of plaintiff's motion for a new trial. By reference to this motion, we learn that it was based upon the ground, that the court erred in refusing certain instructions. To the overruling of the motion, plaintiff excepted, but there is nothing to show that he excepted or made any objection at the time the instructions were refused.

Lake /

Held, That having failed to ~~trust~~ his exceptions to the ruling of the court, in refusing said instructions, at the time of such refusal, it was too late to do so after verdict, and that this court would not inquire whether they should or should not have been given. *Rollins v. Tucker*, 3 Iowa, 218.

Judgment affirmed.

MILLER v. THE STATE OF IOWA.

The act allowing a change of venue in suits pending before justices of the peace, approved January 24, 1853, applies to criminal, as well as civil, cases.

Where an affidavit for an appeal in a criminal case, shows error, which is not controverted by the return of the justice, the appellant should be granted a new trial.

Error to the Mahaska District Court.

THIS was a complaint entered before a justice of the peace, against the defendant, for an assault and battery. The defendant filed a proper affidavit for change of venue, which was refused, upon the ground that the act of 1853, (stat. 1853, 94), does not apply to criminal cases. The trial proceeded before the justice, and the defendant was convicted. He filed an affidavit of facts, and appealed. In the District Court, the judgment of the justice was affirmed.

Crookham & Fisher, for the plaintiff in error.

Samuel A. Rice, (Atty. Genl.,) for the State.

WOODWARD, J.—We think the District Court erred in holding that the act of January 24, 1853, allowing a change of venue before a justice, did not apply to criminal cases. The Code did not allow such change of venue, and this act was designed to remedy the supposed evil. It must apply to criminal as well as civil causes.

The District Court should have granted the defendant a trial in that court, on his affidavit for appeal. This is sufficient, unless controverted by the return of the justice, which is not the case in this instance. *State v. Garretson*, ante. In this there was error, and the judgment is reversed.

Jacobs v. Andrews.

JACOBS v. ANDREWS.

Where a party willfully, carelessly, or negligently sets out fire, and it escapes into, and consumes another's property, he is liable for the damages resulting from his act; and it is not necessary, in order to fix his liability, that the act should have been done, with intent to injure the party complaining.

Where in an action for setting out fire, by which the plaintiff's property was injured, the court instructed the jury as follows: "That although the jury should conclude, from the testimony, that defendant set out the fire in question, yet, unless they believe that he set out the same, willfully, carelessly, and negligently, *and with intent* to injure the plaintiff, the defendant is not liable;" *Held*, That the instruction was erroneous.

Appeal from the Henry District Court.

THE petition in this cause charges that the defendant, willfully and negligently, and without proper care and caution, intending and contriving to injure the plaintiff, set fire to the grass and herbage on defendant's land adjoining that of plaintiff, and negligently allowed the fire to spread, and pass to the premises of plaintiff, whereby the property of plaintiff of great value, was destroyed and burned. On the trial, the court instructed the jury as follows: "That although the jury should conclude from the testimony, that the defendant set out the fire in question, yet, unless they believe that he set out the same, willfully, carelessly and negligently, and with intent to injure the plaintiff, he is not liable." To the giving of this instruction, plaintiff excepted. There was a verdict and judgment for the defendant, and plaintiff appeals.

J. C. Hall, for the appellant.

No appearance for the appellee.

STOCKTON, J.—The question involved in the present cause, has been before this court in various forms, and the principle that fixes the liability of the defendant, has been several times decided. In the case of *Defrance v. Spencer*, 2

Jacobs v. Andrews.

G. Green, 462, it was held, that when from good motives, and under prudential circumstances, a person sets out fire, and uses such care and diligence to prevent it from spreading, as a man of ordinary caution would use to prevent it from injuring his own property, he is not liable for the damage it may do to the property of others.

In *Hanlon v. Ingram*, 1 Iowa, 108, it was held, that granting the party the right to set out the fire, it was his duty so to set it out and control it, that it shall not injure the property of his neighbor. He must use his best efforts, and all reasonable diligence, to prevent any injury. Even if set out under prudential circumstances, it is still incumbent on him to guard against its spreading to his neighbor's premises, by all reasonable efforts. Such being his duty, if he is guilty of negligence, he is liable for the consequences. The same case was again before this court, at the June term, 1856, at which time the decision in *DeFrance v. Spencer*, was adhered to. The court say, (3 Iowa, 84,) that if the circumstances disclose with reasonable certainty, that in setting out the fire and preventing its escape, the defendant has not used those precautionary measures, which a prudent and cautious man would use with reference to his own property, they should hold him liable.

The principles governing the causes above cited, are decisive of the only question arising in the present one. The instruction was obviously erroneous. If the defendant willfully, carelessly or negligently set out fire, and it escaped into and consumed the plaintiff's property, he is liable for the damages resulting from his act. It is not necessary in order to fix his liability, that the act should have been done with intent to injure the plaintiff.

Judgment reversed.

Ault v. Sloan.

AULT v. SLOAN.

Where in an action by the indorsee of a promissory note, against the maker and indorser, the court instructed the jury, "that if they found the indorser was released, by want of notice of non-payment, still, if they also found that he subsequently *promised* to pay the note, he could be held liable;" and where it was insisted in the Supreme Court, that the instruction should have been qualified, by informing the jury, that such promise, in order to bind the indorser, must have been made with the knowledge that he had been released; and where there was nothing in the record to show that such qualification was asked or insisted on at the trial; *Held*, 1. That while the instruction might have more fully stated the law, with the qualification insisted upon, yet, that giving the word *promise* its proper legal signification, there was no reasonable probability that the jury was misled by the instruction, to the prejudice of the appellant; 2. That the party having failed to ask for a qualification of the instruction in the court below, could not make the error in the instruction, a ground of complaint in the appellate court.

Appeal from the Dubuque District Court.

THIS suit was brought on a negotiable promissory note by the indorsee, against Merritt, the maker, and Sloan, the indorser thereof. There was judgment by default against the maker, and issue joined between the plaintiff and indorser, as to the latter's liability. On this trial, the controversy appears to have been, whether the indorser was released for want of notice of the non-payment of the note by the maker. The court instructed the jury, that "if they found the indorser was released by want of notice of non-payment, still if they also found that he subsequently *promised* to pay the note, he can be held liable." Verdict and judgment for plaintiff, and defendant appeals.

Adams & Cooley, for the appellant.

Chapline & Dillon, for the appellee.

WRIGHT, C. J.—The only objection urged to the instruction given by the court, is, that the jury should have also

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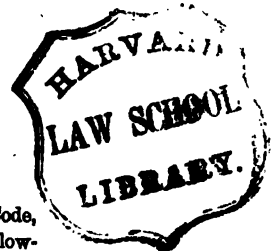
been told, that the subsequent promise, in order to bind the indorser, must have been made with the *knowledge* that he had been released. There is nothing to show that this qualification or addition, was asked or insisted upon by the defendant, at the time the instruction was given. The error of the court, if any, according to appellant's argument, lies in the fact, that it did not give all the law on this subject, or proceed to state all those things which were necessary to constitute a good and valid promise on the part of the indorser. We think that while the instruction might have more fully stated the law, with the qualification now insisted upon by defendant, yet that giving to the word *promise* its proper legal signification, in which sense the jury are presumed to have received it, there is no reasonable probability that they were misled thereby, to appellant's prejudice. It was said in *Miller v. Bryan*, 3 Iowa, 58, on a question very similar to this, "that to have prevented any possible, or even probable misapprehension by the jury, the plaintiff (in this case, the defendant,) might well have asked for the qualification now suggested. Having failed to do so, we do not think he can now complain." So, in this case, if all the law on the subject was not given to the jury, it was the fault of the appellant. So far as it was given, we are unable to see that any prejudice could, or did reasonably result therefrom to defendant's cause.

Judgment affirmed.

O'HAGAN v. EXECUTOR OF O'HAGAN.

A proceeding by a wife against the husband, under section 1485 of the Code, asking for a change or modification of a former decree, making an allowance for the support of the wife, abates by the death of the husband. (STOCKTON, J., *dissenting*.)

Where a wife obtained a decree of divorce against the husband, in which the husband was required to pay her a certain sum, "in full as alimony;" and where the wife subsequently filed her bill, asking that the former decree, so



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far as it related to alimony, might be changed, so as to give her a further monthly allowance for the support of herself and children, during the pendency of which bill, the husband died; and where the executor of the husband, was made a party respondent, and insisted that the proceeding abated on the death of the husband, and the court dismissed the bill of the complainant; *Held*, That the bill was properly dismissed.

Appeal from the Dubuque District Court.

PRIOR to the October term, 1851, of the District Court of Dubuque county, the complainant filed her petition therein, asking a divorce from the bonds of matrimony existing between her and her husband, Charles O'Hagan. At that term a divorce was decreed as prayed, and the husband required to pay a certain sum, "*in full, as alimony,*" to the said petitioner. At the October term, 1854, she filed the bill in this cause, setting forth various reasons why the former decree, so far as it related to alimony, should be changed, and praying that it should be so modified as to give her such further monthly allowance, for the support of herself and children, as to the court might seem equitable and just, in view of all the circumstances. While this bill was pending, the said Charles departed this life, and his executor, Geo. L. Nightengale, being made a party respondent, insisted that the said proceeding abated on the death of the husband, and that complainant ought not to be allowed to further prosecute the same. The court below being of this opinion, dismissed the bill, and complainant appeals.

Clark & Bissell, for the appellant.

The main point in this case, is whether the cause abated upon the death of the defendant. We say that it did not. The defendant's counsel refer to certain sections of Bishop on Marriage and Divorce, to sustain their position of abatement, and especially to sections 559, 591, 592. By an examination of the English authorities, it will appear that alimony is an allowance to the wife, while living separate and apart from her husband—and always allowed upon a decree in favor of the wife *a mensa et thoro*. And the object

is expressly stated to be the reconciliation and re-union of the parties. No doubt the policy of law is the same here upon a like divorce.

But no such limitation prevails upon a dissolution of the bonds of matrimony. In such case no re-union is expected; the reason of the law, therefore, is not the same. The Code gives to the wife, a support upon a divorce from the bonds of matrimony—and this is not called alimony, save in the caption of the chapter. But it is of no importance by what name the thing is called. It derives its character from the provision of the Code respecting it—and in this view it is of different and more extensive signification, than those cases in the English law, which govern alimony *a mensa*. Upon a divorce *a vinculo*, there is no expectation of parties coming together again—there is, therefore, no policy of law to induce it. Why then, should the support of the wife and children be limited to the life of the husband—or why should his obligation cease at his death? Other obligations do not cease at his death, but his estate is liable for them: Is the obligation to support those sustaining the tender and sacred relation of wife and children less than to pay an indebtedness to a stranger? See Bishop on Marriage and Divorce, §§ 600, 601, where it is expressly stated to have been laid down by NELSON, C. J., that alimony under the statute may be made by the decree to continue after the death of the husband, during the entire life of the wife.

Reference is made to the case of *Burr v. Burr*, 10 Paige, 20. We refer the court to the remarks of that eminent jurist in that case.

Among other things he quotes the statute of New York as follows: "The statute authorizes the court to make such order and decree for the suitable support and maintenance of the wife, out of the property of the husband as may be just and proper." Is not the language of the Code equally clear, comprehensive and strong?

"The court may make such order in relation to the property of the parties and the maintenance of the wife, as shall be right and proper." Section 1485. The language of the

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two acts is remarkable for similarity, in so much that the one is almost a transcript of the other. Which then is the better authority, that appertaining to the ecclesiastical courts of England, or a well reasoned case upon a statute like our own?

But if we have shown that alimony, or which is the same thing, a support, may be decreed for the life of the wife, and beyond the death of the husband, does it not follow as a consequence that the action survives? In case of a decree before the death of the husband, for alimony, during the life of the wife, and the wife should survive, revivor would follow against the representatives. And why, we ask, might not revivor as well be had in case of the death of the husband before, as after the decree? and especially when the suit is commenced before his death, and the decree is subject by law to be changed? See 9 N. H. Rep. 309; 9 Ohio Rep. 37. Both of which cases go to show that alimony derives its meaning from the statute, and signifies support, without limitation as to time. See also Bishop on M. & D. § 560; 3 Dana's R. 29, 30. This last case shows what alimony is in its ordinary acceptation. It is maintenance during coverture, or until reconciliation. In that case the court say, there being no divorce *a vinculo*, an allowance cannot be decreed for the term of the wife's life.

Again, we say this action survives by section 1698 of the Code. This language may be regarded as peculiar, and not easy of construction; but it has a meaning, and the court must say what that meaning is. From the nature of this case, the cause can survive; out of the nature of the case, grow the necessities of the woman; her wants continue as well after the death of the husband as before; and we would ask, does death relieve him of his solemn obligations? That event does not change the *nature* of the case. In case of torts, death may in some measure at least work a change on the nature of the case—damages are given in part as a penalty—but no human penalty can reach a dead man. But we think the meaning of the section referred to, would be more accurately ascertained by considering as to which

party the action survives. Were the complainant to die, the *nature* of the action would not survive, because support would be no longer needed. If the action survives by that section of the Code to which we have referred, it alone is sufficient for our purpose.

In the court below, much reliance was placed by counsel, on the case of *Gaines v. Gaines*, 9 B. Monroe. But we submit that that case is similar to this in no one of its features. In that case there was no divorce on the part of the wife, of any kind. She left him, it may be for good cause, and made her application for support; pending this application, the husband obtains a *stolen* legislative divorce, and then pleads the same in bar of the wife's application for alimony. The engrossing question in that case, was as to the effect of the legislative divorce. It is true the court do consider the question of alimony. But the views of the court are of course limited to the true character of the case. Before the cause came on to be heard, the husband died, whereupon the wife filed her supplemental bill, in which she asked, in addition to alimony, a distributive share of the estate, and also dower. The court say, that the claim to alimony, *as such*, ceases at the death of the husband, when the wife becomes entitled to dower. And this is no doubt true, in case of a divorce *a mensa*, for she is still the wife; but in case of a divorce *a vinculo*, she no longer sustains that relation. Is she then entitled to dower? If she is not, it would seem clear that the court ought to give her a most liberal support. Can it do this with certainty of justice, unless the husband's estate can be reached after his death? In the case before the court, \$400 might not have been unreasonable at the time it was allowed, whereas, afterwards, it might be a mere pittance.

We think the case of *Jolly v. Jolly*, 1 Iowa, 9, is materially in aid of the views here presented. If it is competent for the court to decree the wife a portion of the husband's estate *absolutely*, relief would not be cut short by the death of the husband. Precarious indeed, would be the condition of the divorced wife, were such the case. The entire

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reasoning of this court, in the case referred to, supports such construction of the law as comports with the necessities of the injured party, and the subsisting obligation of the party inflicting it.

Nightengale & Wilson, and *Doud*, for the appellee.

The nature of the case is stated in the argument of the appellant, in which it is conceded that the only point in the case now before the court, is, does the suit for alimony survive the death of defendant, Chas. O'Hagan, and can it be carried on against his administrators?

Alimony is the allowance, (regular—yearly or monthly, or weekly), which a husband pays by order of court to his wife, who is living separate from him, during the period of their separation, for her maintenance. See *Bishop on Marriage and Divorce*, § 549, and note 1, with cases cited; *Ibid.* § 560; *Wallingsford v. Wallingsford*, 6 Harris & John. 485.

Our statute provides that when a divorce is decreed, (or upon the granting of any divorce), the court may make such order in relation to the children and property of the parties, and the maintenance of the wife, as shall be right and proper—evidently contemplating that the order for alimony, can only be made at the time when the decree for divorce is made, and of course when both parties are living. See Code of Iowa, § 1485; *Bishop on Marriage and Divorce*, § 549.

Alimony can exist only so long as the husband's duty to maintain the wife exists, which duty ceases at his death. *Bishop M. & D.* §§ 560, 591 and 592, and cases cited, particularly § 592, wherein reason is given for occasional decree, to continue in some cases longer—in aggravated cases. *Barr v. Barr*, 7 Hill, 209. Consequently appellant's suit for alimony, abated at the death of defendant, and cannot, from the nature of the case survive, against defendant's administrator. See Code of Iowa, § 1698; *Bishop on M. & D.* § 559, and cases cited; *Gaines v. Gaines*, 9 B. Monroe, 299.

The case of *Burr v. Burr*, 10 Paige, 20, and *Bishop on*

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M. & D. § 600, cited by appellant, are not in point. In the cases referred to there, the alimony was decreed at the time the divorce was decreed, and between the parties then living; which decree for alimony was to continue till after the death of the husband. In the case before us, appellant seeks to obtain a decree for alimony, long after the time of granting the divorce, and after the death of defendant. Besides, if they were in point, they do not aid in ascertaining the meaning of the New York statute, or our statute, because the remarks by the judge in the case of *Burr v. Burr*, are wholly extra-judicial, so far as they relate to the time alimony might be decreed to continue; the only question decided in that case being, whether a gross sum or an annuity, could be decreed, and whether the amount decreed by the vice-chancellor below, was too great.

WRIGHT, C. J.[1]—This bill was filed under section 1485 of the Code, which gives to the court decreeing a divorce, the power to make such order in relation to the children and property of the parties, and the maintenance of the wife, as shall be right and proper, and which also provides, that "subsequent changes may be made by the court in these respects, when circumstances render them expedient." Does a proceeding asking such change, or modification, abate by the death of the husband? is the only question presented for our determination. We clearly think it does. What is alimony, and what its original object and purpose? As stated in *Jolly v. Jolly*, 1 Iowa, 9, it is the nourishment—the maintenance—the allowance made for the support of the wife, which is given and fixed by the proper court, out of the husband's estate, when they are legally separated. So in *Bishop on M. & Div.* § 549, it is said to be the allowance which a husband pays by order of court to his wife, who is living separate from him, for her maintenance. And in *Wallingsford v. Wallingsford*, 6 Har. & J. 485, it is stated to be, not a portion of his real estate to be assigned to her in fee sim-

[1] BROCKROF, J., dissenting.

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ple, subject to her control, or to be sold at her pleasure, but a provision for her support, to continue during their joint lives, or so long as they live separate. As a separate, independent right, it has no common-law existence, but is always appurtenant or incident to some proceeding for some other purpose. So also, being a provision for her support during separation only, and looking to a possible reconciliation, and recohabitation of the parties, it is manifest that it originally was authorized only in cases of divorce *a mensa*, and not in those which dissolved the marriage, or the matrimonial bond. In this country, however, the statutes of the different states generally, authorize that where a divorce of either kind is granted, there may also be a decree for alimony, or some equitable and fair division of the property. In making such decree, our courts are not, in many of the states, confined to giving to the wife sums of money, payable at regular periods; nor to giving her money merely; but may give her absolutely a specific portion of his estate or property, whether real or personal. And in decreeing her sums of money, in the first instance, or in making the proper and equitable order in relation to their property, and her maintenance, the decree may provide for the payment thereof from year to year, for a specified period, or may provide even that it shall continue during her life. And thus, we see, that alimony as originally understood and decreed in the English courts, and the class of cases in which it was given, has been greatly changed and modified by the statutes of the different states, and the decisions of our courts. *Barr v. Barr*, 7 Hill, 209; *Richardson v. Richardson*, 8 Yerger, 67; *Fischli v. Fischli*, 1 Blackf. 360; *Reavis v. Reavis*, 1 Scam. 242; Bishop on M. & D. 591, 592.

But notwithstanding all these modifications, we do not understand that any court has yet held, that the wife, after the death of the husband, may ask an allowance of this character. Nor is there any case to be found in the books, as we believe, recognizing the right of the wife to prosecute her suit for alimony, commenced in the husband's lifetime, after his decease. Where the bill is for a divorce, and ali-

mony as appurtenant or incident thereto, the death of the husband, of necessity, abates so much of the bill as seeks the divorce, and as necessarily, as we think, that portion which seeks alimony—if for no other reason, because a bill for alimony alone, is unknown to the common law, and is certainly not allowed in this state. And as an original suit for divorce and alimony, would abate by the death of the husband, for the same reasons would a proceeding to modify or change a former decree in relation to the wife's support, abate. Are we asked why the wife may not apply to the courts for alimony, or for the modification of a former decree in respect to the same, after the husband's death; or may not prosecute a suit already pending against his administrator? we answer, because upon his death, *if his widow*, she is entitled to dower, to be set apart to her in the method provided by law—and any pending claim for alimony is necessarily, and legally merged and swallowed up in such dower right. If not his widow, nor entitled to dower, we do not know upon what ground she would be entitled to alimony. The allowance of alimony must be made from a living husband, to a living wife, and upon the death of either party, the courts possess no further power, in respect to such allowance.

But it is said that a decree may be made giving to the wife an annual or other allowance during her life, which may extend, and be enforced against his estate beyond the life of the husband; and if so, a court may also modify a former decree, either in favor of or against the husband, after his death. The answer to this is, that in such a case, the court has acted upon the whole question, during their joint lives, and has decreed to her a definite and fixed sum. This decree has the same force and validity as any other judgment, and may be collected in the same manner. It is a fixed, ascertained, and subsisting debt against him, and upon his death, against his estate. Not so, however, with a claim for alimony which never has been settled; or where the wife, after his death, seeks to increase the amount allowed in his lifetime. It is not a demand, definite in its

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character, to which she has an absolute right. By the decree giving her an absolute sum during her life, she stands as any other creditor, and her right to payment does not depend upon the amount of his estate, whereas the ability of the husband, and their condition in life, are important to be considered in awarding alimony, or in changing a dower for the same. The case of *Gaines v. Gaines*, 9 B. Monroe, 295, expressly decides that the claim to alimony, as such, ceases at the death of the husband, and the petition of the wife therefor, was refused, though pending at his decease—the court saying, “we are of opinion that such claim, though asserted before his death, will cease by that event, and cannot be afterwards availably asserted, unless it has been before ascertained and fixed by decree.” And to the same effect, see Bishop on M. & D. § 559. The case of *Jolly v. Jolly*, 1 Iowa, 9, referred to by appellant, decides only, that under the Code, in applications for a divorce and alimony, the court may give to the wife a certain portion of the husband's lands in fee simple.

But it is claimed, that this case comes within section 1698 of the Code, which provides that actions do not abate by the death of either party, if from the nature of the case, the cause of action can survive. Much that we have before said, is applicable to the argument attempted to be drawn from this section. It might admit of a doubt, whether a proceeding of this character is an *action* within the meaning of this provision. But however this may be, we think that whether the action or proceeding has been commenced or not, the remedy of the party is gone, or must abate, unless the cause of action is of such a nature that it can survive. What are such causes of action, we determine from the common law and our own statutes. But what court ever held, or what provision of our law contemplates, that after the death of the husband, the wife may, by suit, claim alimony from his estate? If such an action or proceeding should be commenced *after* his death, no person, perhaps, would claim that it could be maintained. So, if instead of by an original action claiming alimony, she should, after his

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death, file her bill to modify a former decree, we apprehend that it would meet but with little, if any, favor. And why? We answer, because from the very nature of the relief sought—from the character of the relation out of which the claim originates—from the nature of the cause of action, as recognized by the uniform adjudications of this country and England—the judicial mind resists the proposition to decree the wife alimony, or change that before allowed her, after the husband's death, as being inconsistent and incompatible with *her* new position, and the rights of the heirs and others interested in the estate. And, in like manner, and from the same considerations, it would seem that the fact that she filed her bill asking such modification before his death, could not change the nature of the cause of action—nor make more complete her right to the relief prayed for.

Decree affirmed.

STOCKTON, J. dissenting.—I concur in the decision of the court which affirms the judgment of the District Court.

But I dissent from that part of the opinion of the chief justice, which rules that the application made by the wife, to obtain a modification or change in the order allowing her maintenance from the husband's property, abates by reason of the husband's death, pending the application. My concurrence in the judgment of affirmance, is based upon the fact, that I do not understand from the record, that the question was made to the District Court, that the proceedings abated by reason of the husband's death, nor does the record show that any such question was decided. It does appear, however, that evidence was introduced, tending to show that the applicant was not entitled to the relief sought; and to all appearance, the judgment of the district was rendered, upon the merits of the whole case, dismissing the application, after a full investigation, and after the examination of testimony on both sides. Such a judgment I would not disturb, unless it was manifest that there was an improper exercise of the discretion allowed, in granting or refusing, an additional amount for the maintenance of the

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wife. That the wife may be entitled to receive an additional sum for maintenance from her husband, dependent upon the prices of living, or upon a change in the circumstances of the parties, is not denied. She has a right to a support from her husband, and from his estate, if he is dead. This right becomes fixed and vested upon the granting of the decree for divorce, if it is made upon her application as the injured party. The court may make such order for her maintenance as shall be right and proper, (Code, § 1845,) and may change the allowance, when circumstances render it expedient. Why the application should abate, and why her right to have such change made, should cease and determine with the death of the husband, I can see no good reason. I particularly, see no sufficient reason for the adjudication of the question in this cause, when it does not appear to have been decided by the court below.

For these reasons, thus briefly stated, I dissent from the decision of the court, so far as it holds that the application for an increase in the amount allowed the wife, for her maintenance, out of the husband's property, abates at the husband's death.

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Where R. P. on the 25th day of June, 1851, made his written will, and died about the first of August, 1855; and where the said R. P., a few days before his death, and during his last sickness, in the presence of several persons, stated that he "wanted his affairs managed as follows: 1. That there was near \$400 on hand, which he wished to be given to his wife; 2. That he directed the personal property to be sold, and the proceeds to be for the use of his wife; and 3. That he directed the farm to be sold, and each heir to have \$200 out of the proceeds thereof;" and also, at the same time, spoke of his written will, and supposed it was of no force, as it had never been recorded, and was not to his fiction, and said "that one child was as near to him as another;" which verbal disposition was never reduced to writing; *Held*, That there was no revocation of the written will.

Where on an appeal to the District Court, from the decision of the county court, refusing to admit a will to probate, it appeared that the county court

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found, that said will was duly executed; that the testator was of full age, and sound mind and memory; and that the testator at the time of his death, had changed his mind, and did not desire that said instrument should stand as his will, and thereupon the said county court ordered, that said will be not admitted to probate; and where the District Court, on hearing the cause, made an order that said will be admitted to probate, upon proper and sufficient proof being made to the county court, and that the cause be remanded to the county court, for further proceedings not inconsistent with the decision of the District Court; *Held*, 1. That it was unnecessary to remand the cause to the county court, for further proof of the execution of the will; 2. That the order should have been, that the county court admit the will to probate, and take further proceedings not inconsistent with the finding of the District Court; 3. That the District Court did not err in remanding the cause to the county court.

Appeal from the Appanoose District Court.

RICHARD PERJUE, the father of these parties, made his written will, February 25, 1851, and died about the first of August, 1855. By the terms of this will, his entire estate was given to his wife, for and during her life, upon conditions therein stated, excepting a small amount to a granddaughter. Upon the death of the wife, or if she should marry, his property was devised as follows: To the plaintiff, Ira Perjue, ten dollars; and to his other children, (four in number), all the remaining portion, share and share alike.

At the October term, 1855, of the county court, this will was brought in, and the hearing of proof as to the execution of the same, continued until the December term. At this term, the proof was heard, from which it was found, that said will was duly executed; and that the testator was of full age, and sound mind and memory. And it further appeared, (to use the language of the record,) "that the said testator, at the time of his death, had changed his mind, and did not desire that said instrument should stand as his will," and it was thereupon ordered, "that said will be not allowed and admitted to probate, and that the same be not recorded." From this order, the defendants appealed to the District Court. On the hearing in that court, the cause was submitted to the judge, who found the facts to be as follows: That the will was made and executed on the

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day of its date, and that the testator was of sound mind; that in June or July following, he was still well satisfied with the same; that about the first of August, 1855, a few days before his death, and during his last sickness, the testator, in the presence of several persons, stated that he "wanted his affairs arranged as follows: 1. That there was near \$400 on hand, which he wished given to his wife; 2. He directed the personal property to be sold, and the proceeds to be for the use of the wife; 3. He directed the farm to be sold, and each heir to have two hundred dollars out of the proceeds thereof." It was also found that at the same time, he "spoke of his written will, and supposed it was of no force, as it never had been recorded, and was not to his notion, and that one child was as near to him as another." This verbal disposition was never reduced to writing.

From these facts, it was found that while the deceased in 1855, declared his intention to dispose of his property, as above stated, yet that said intention remained unexecuted, and that the will was not thereby revoked. An order was thereupon made, that said will "be admitted to probate, upon proper and sufficient proof being made to the county court; and that said cause be remanded to said court, for further proceeding not inconsistent with said finding and decision. From this judgment, plaintiffs appeal.

Trimble & Galbraith, for the appellant.

S. W. Summers, for the appellees.

WRIGHT, C. J.—We do not understand it to be claimed, with any confidence, by appellants, that there was a *revocation* of the will by what was said and done by the testator, in August, 1855. And without now determining what, under our law, would amount to a revocation, or of the methods in which this revocation may take place, it is sufficient to say, that the circumstances disclosed in this case, can in no way or manner affect the validity of this will. There was certainly no express revocation, nor is there any.

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ground for claiming that it was impliedly revoked. 4 Kent, 521.; 1 Greenlf. Ev. § 273; Code, § 1288.

It is urged, however, that the District Court should have made an order adopting the will, and that it was error to remand the case for proof to the county court. Why the appellants should complain of this, we are at a loss to understand. Whatever error there was in this order, was to the prejudice of the appellees. As appears from the records of the county court, the said will was fully and sufficiently proved before the appeal to the District Court. It is manifest that no question was made in either court, as to the due and proper execution thereof, but that it was sought to be avoided, by proof of such subsequent acts as were claimed to amount, if not to a revocation, at least to a change of intention, which was so far executed or carried out, as to render parts, if not all of said will, nugatory and void. There could be no prejudice, therefore, to appellants, in the order remanding the case to the county court, with instructions to admit the will to probate, upon proper and sufficient proof being made. The proof had already been made to the satisfaction of both courts, and it was entirely unnecessary to require the same to be again produced. The order should have been, that the county court admit the same to probate, and take further proceedings not inconsistent with the finding of the District Court.

The objection that the District Court should have admitted the will to probate, and not have remanded the case to the county court for any purpose, is entirely untenable. The appellate court had nothing to do with the case, nor with the administration of the estate, beyond hearing the appeal. When that was determined, there was no reason for retaining it in that court; nor any necessity for making the final order permitting it to be recorded. To have done so, would have involved the necessity of having it recorded in a book, unknown to the records of the District Court, but which, under the law, is kept and provided by the county court alone. Code, § 1295.

Judgment affirmed.

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Where a creditor's bill was filed in September, 1854, which did not require the respondents to answer under oath, and the answer to which was not sworn to; and where, after the cause had been pending two or three terms, and over a year, the respondents asked and obtained leave to file an amended answer, in the nature of a plea, and on the 16th of June, 1856, filed an answer, consisting of the entire former one, with an addition setting up other matter, which amended answer was sworn to; *Held*, That the answer could not be treated as a sworn answer.

In proceedings under a creditor's bill, to reach real estate alleged to have been fraudulently conveyed, neither the answer of the grantor, in a chancery suit, nor his oral declarations made, nor letters subsequent to the conveyance, are receivable in evidence to affect the title of the grantee, without evidence that the grantee colluded with the grantor, with a fraudulent intent.

And the declarations of the grantor, made after such conveyance, are not receivable in evidence, to show such collusion.

Appeal from the Muscatine District Court.

ON the first day of May, A. D. 1854, James M. De France recovered judgment against William Howard for the sum of \$1,281.12 and costs, in the District Court, in Scott county. Execution was issued and returned *nulla bona*. On the first of September, A. D. 1854, De France filed his bill in Chancery against the said Howard, and McGregor & Lawes, alleging such matter as will appear from the following statement: On the 18th August, 1852, the defendant Howard entered into arrangements with McGregor & Lawes, who were bankers, for pecuniary accommodations from time to time; and to that end executed to them his promissory note for three thousand dollars, payable one year from date, and as security gave a mortgage on fifteen lots, in a certain block in Tichenor's addition to the town of Davenport. There were sixteen lots in the block. On number eleven was situate a steam saw mill, and on numbers eight and nine, he was then building, and did build, a dwelling-house. To the lots numbered from five

to eleven inclusive, he had title, but to the remainder, numbers one to four, and twelve to sixteen, inclusive, he had not perfect title, but held a title bond from one Whistler, on which was due the sum of \$1,588.50. Lot number eleven, on which was the saw mill, was not contained in the mortgage. Howard was to make deposits with McGregor & Lawes, and to be allowed six per cent. interest upon them, and he was to pay two and a half per cent. interest per month upon advances drawn. About the 30th April, 1858, or between that and the 2d of May, it is alleged that Howard absconded, as well as one Weeks, with whom Howard was in partnership. The transaction appears to include the debts and affairs of Howard & Weeks, as well as those of Howard alone. The latter was the active partner. The complainant alleges that at a settlement in April, 1858, the parties found due to McGregor & Lawes about \$2,670, beside \$1,588.50, due Whistler on his bond, making a total of \$4,208, but avers that such sum was not due in fact, for that Howard had placed in their hands 436 barrels of flour, which produced the clear sum of \$1,308, which would leave but \$2,885 due the complainants, including that due Whistler. On the 30th April, 1858, Howard conveyed to McGregor & Lawes, by absolute deed, the lots numbered five, six, seven, ten and eleven, and assigned the bond from Whistler, which included lots numbered one to four, and twelve to sixteen, inclusive. This conveyance and assignment the complainant alleges to have been with intent to hinder, delay and defraud the creditors of Howard, and therefore to be fraudulent and void as to them.

The respondents, McGregor & Lawes, deny the alleged fraudulent intent, and all knowledge of any intent, on the part of Howard & Weeks to leave secretly, or to defraud their creditors, and claim that the transaction was *bona fide* on their part, and for a good and valuable consideration. They claim that on the above settlement, there were due them \$3,623.60, after allowing the \$1,308 for the flour, and on Whistler's bond \$1,588.50, and that there were certain other debts of Howard & Weeks, which they undertook to

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pay, and did pay, amounting to \$2,878.01. The consideration stated in the deed from Howard to McGregor & Lawes, is \$7,000. On the 18th August, 1853, Howard conveyed to McGregor & Lawes lots eight and nine in the said block, being the remainder of the said sixteen lots. The complainant avers that at this time Howard secretly returned to Davenport, and made the above conveyance, also to defraud his creditors; and that the defendants paid only the sum first named, that is, the \$2,885. The respondents answer that these lots constitute the homestead of Howard, and were exempt from liability for debt, and that they took the conveyance thereof *bona fide*, and paid a valuable consideration therefor, viz: \$1,700 down, paid to the wife of Howard, and gave their obligation for \$300, the balance, subject to an attachment which had been levied on those lots, and to await the result of that attachment. The plaintiffs charge fraud in all these conveyances and transactions, and an intent on both parties to defraud the creditors of Howard & Weeks. The defendants, McGregor & Lawes, deny all such fraud in fact and in intent. Howard makes default. It is farther alleged, and it appears, that on the 26th of December, 1853, McGregor & Lawes sold all the above lots and property, to one John M. Cannon, for the consideration of \$10,000. The petitioners did not call for an answer under oath, and it was not sworn to.

The petition was filed in September, 1854, and after the cause had been pending two or three terms, and during the space of twelve months, the respondents asked and obtained leave to file an amended answer in the nature of a plea, and on the 6th June, 1856, filed an answer, consisting first, of the entire former answer, and secondly, of a statement of judgments to the amount of \$3,519.87, of which they claim to have become the purchasers and assignees, which were rendered against said Howard, on the 4th of October, 1853, and which defendants claim to have constituted liens on the said property prior to the judgment of the complainant. To this amended or supplemental answer, the defendants, make oath, and the petitioner objects, and moves to strike

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out the *jurat*. Among the evidence offered, the plaintiff files the depositions of Cook, Barrows, Arndt, Stevenson, &c., a prominent feature in which, is the declarations of Howard made subsequently to one or both of the foregoing conveyances. The petitioner also offers letters of both McGregor and Howard. He further introduces as evidence the bill, answers, replication, exhibits, and in short all the papers constituting the case of Wilbur, Brown & *al.* against the said Howard & Weeks, McGregor & Lawes, and Cannon, and the entire record in the case of *Corwith & Co. v. Howard*. The respondents appeal.

Mitchell & Putnam, for the appellants.

Whitaker & Grant, for the appellee.

WOODWARD, J.—This cause, during its progress and examination, becomes somewhat complicated, and many questions, some of which are of intrinsic consequence, are raised; but under the view which we ultimately take, it will not be necessary to enter into a consideration of all of them, and we may pass some of them with brief notice. Under the circumstance that the answer is not sworn to, and that the defendants obtained leave to amend their answer in the nature of a plea, and then filed their original answer with the addition of matter of the proper nature, is raised the question, whether the common-law rule as to answers in Chancery, or the Code, prevails. In other words, it is the question, whether an answer in Chancery can be sworn to with any effect, unless such verification is called for. As desirable as it is that this question should be settled, yet, as it would involve a very considerable discussion, we do not feel inclined, under the pressure of imperative business, to stop and consider it, inasmuch as the necessity of so doing is obviated by the view which we take of the cause. We feel satisfied that, even at common law, the defendants, having so long omitted to make oath to their answer, and on application having been refused by the

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court, cannot produce the desired effect, by incorporating a little new matter, under the special leave given, into their old answer, and making affidavit to it. This cannot give the force of a sworn answer to the original one. But it will be seen that this question is of but little practical importance in its relation to the present cause.

A more important inquiry arises, on the aim of the petitioner to affect McGregor & Lawes, with knowledge of, and participation in, the alleged fraud, by means of the evidence afforded in the declarations of Howard, subsequent to one or both of the conveyances, by his letters to McGregor and others, and by his answer in the former suit of Wilbur, Brown *et al.* against these parties. A prominent feature in the depositions offered, is the declarations and admissions of Howard. A few words may be necessary for the understanding of the cause of Wilbur and others, before alluded to. On the 4th of October, 1853, Wilbur, Brown, Kurtz, Parker and Corwith, in their several suits, recovered judgments, in Scott county, against the said Howard & Weeks, for their respective claims, amounting in all to the sum of \$3,548.43, or thereabouts, including cost. On the 14th of January, 1854, they joined, as creditors, in a bill against Howard & Weeks, McGregor & Lawes, and Cannon, the intent and object of which bill was identical with that of the bill in the present cause. The venue was changed from Scott to Muscatine county, and such proceedings were had, that on the 18th of October, 1855, the cause was settled by the parties, by an agreement in writing, which is entered of record, and by which those complainants acknowledge the receipt of the full amount of their respective judgments from McGregor & Lawes, in consideration of which they assign and transfer the same to them. Upon this, the following decree was rendered: "And now on this 18th day of October, A. D. 1855, come the said parties by their attorneys, and file the foregoing agreement in this case. Whereupon the court do now here order, adjudge and decree, that the said cause be finally disposed of as stipulated in said agreement. And it appearing that the plaintiffs

have severally received the amount of their respective claims, and that the plaintiffs have assigned the said judgments against Howard & Weeks and Wm. Howard, to the said McGregor & Lawes, it is further ordered that the said McGregor & Lawes take and hold said judgments in their own right, and control the same as they now stand of record in the said Scott county District Court." It is the answer of Howard in that suit, which the complainant seeks to make evidence against his co-defendants in the present proceeding.

But neither that answer of Howard, nor his oral declarations, nor his letters, are admissible for this purpose. The cases and authorities cited by counsel to support his position, namely, *Osborn v. Bank U. S.*, 9 Wheat. 738, and 1 Greenl. Ev. §§ 176, 178, and those cited by Mr. Greenleaf, do not apply to the present case. If we trust to the general expressions, "claiming through" or under, or "deriving title from," or "taking in succession," we may be misled. We must look at the facts of the case, and see the actual relation of the parties. Thus, if one takes by inheritance or devise, and in like cases, he is bound by the answer and declarations of his ancestor, and so it is probably with one coming in *pendente lite*, and the above cases exhibit other instances. But none of these authorities, and perhaps no other one, holds that the grantor can affect the title of his grantee, by his answer or his declarations. The case of *Christie v. Bishop*, 1 Barb. Ch. R. 105, correctly states the law on this subject, and explains some of the cases cited by counsel and by Mr. Greenleaf.

Without the evidence here alluded to, it is not easy to regard McGregor & Lawes as participating in a fraud—uniting with Howard to defraud his creditors. Nor do we mean to intimate how it would be, were the answer of Howard received, for we have not looked at it, having first settled the question of its admissibility. But it is said that such evidence is receivable against a co-defendant, they being shown to be colluding—to be uniting in a common purpose. Then, this purpose must first be made out by other evi-

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dence, for you cannot, at the same time, make the evidence admissible by showing the collusion, and prove the collusion by the same evidence. The letters of McGregor are not sufficient for this point. They serve another purpose better. So far as the practical result, in our view of the case, is concerned, we should not object to treating the conveyance to McGregor & Lawes as a mortgage, but we are not prepared for the rigid application to it of the rules of law upon secret trusts, so as to declare it constructively fraudulent *in toto*. That McGregor & Lawes were purchasers for a valuable consideration, to some extent, (not now saying how far), is beyond question, and the evidence does not satisfy us that they were participants in an intent fraudulent in fact.

But there is a view of the case, which is competent to do justice to all the parties, without the application of harsh rules, and which we think far more adapted to the actual state of the facts. There is some evidence tending to show that McGregor & Lawes took the property as in mortgage, or more correctly speaking, showing that whilst they actually bought it, yet they were not desirous to hold it, but that Howard, or even any creditor who would satisfy their demands, might take it. This appears to our minds a more just construction to put upon the language of McGregor to some of the witnesses, and that in his letter to Howard. Thus, when Barrows was negotiating about selling the property on commission, McGregor said he wanted "what was due him on the premises, in cash." To Cook, he said, "he did not want the property, but wanted his money to use in his business;" and in his letter to Howard, he says, "knowing as I do, that we bought the property in good faith, and for what we considered a valuable consideration, I feel confident that we can hold it; but I still say to you, as heretofore, that we will, at any time, while we own the property, deed it back to you for what it has cost us, and a fair compensation for the expense and trouble we have been at, and I still hope to see you back and re-instated." It is true that some points look unfavorable for these defendants;

such are the statements of different amounts as due them, and the different manners of making up the amount of the consideration stated in the deed. But the principal view is suggested by Cannon's connection with the transaction. The property is sold to and bought by him. And this takes place before this plaintiff obtained his judgement. Is Cannon to be taken as a fraudulent purchaser? Of course not, since he is not made a party to the present suit. What, then, is the claim of the complainant, in this respect? To answer this question, we must go back. The whole record in the cause of Wilbur, Brown & *al.*, is made evidence in this. Cannon was made a party defendant in that cause, but he was not charged with fraud, nor was an attempt made to recover the property from him on account of such fraud; but the intent was to arrest and charge a portion of the unpaid purchase money in his hands. In the present case, Cannon is not made a party, but that unpaid purchase money is the object aimed at. In December, 1853, when McGregor & Lawes sold to Cannon, he paid \$3,000 down, and gave his four promissory notes for the balance, two of them negotiable, and the last two, payable in eighteen and twenty-four months, for \$1,500 each, not negotiable. And a written agreement was entered into between the parties, reciting that a suit had been commenced by Ira Brown and others, "in relation to said property, against said Howard and ourselves," and providing that if those creditors should establish their claims against said Cannon, or the property in his hands, the amount of such claims should be deducted from the purchase money. The last clause of the agreement contains the substance of the whole, and is in these words: "It is distinctly understood and agreed, that in case said Brown and others, succeed in establishing their claims against the property, and Cannon has to pay the same, all the balance of the purchase money, except what may be paid to said creditors, is to be paid to McGregor & Lawes."

Now, what does the present bill charge in respect to this? It is, that McGregor & Lawes sold to Cannon, "with the understanding, that if certain creditors of Howard should

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effect a recovery against Cannon for the said lots, or money due therefor, the said McGregor & Lawes were to save the said Cannon from any and all loss in the premises," which money due from Cannon, or which may have been paid by him to said McGregor & Lawes, was held by them in secret trust for the benefit of the defendant Howard. Afterwards, during the pendency of this suit, the unpaid balance, due at the time of service upon Cannon, was paid by him to McGregor & Lawes, under a written agreement between the parties to the suit, that such payment should not in any wise affect the case. The complainant claims that under any aspect of the case, he is entitled to an account of the proceeds of the sales of the said property, and a decree for his debt so far as the said proceeds shall extend, and he prays that an account may be taken of the value of the lots so conveyed by Howard to McGregor & Lawes, and that he may have a decree for his debt and costs against the defendants, and such other relief, &c. It is impracticable to set forth the full detail of facts and considerations, as developed by the answers, testimony and papers of the two causes, (the other being made evidence so far as admissible,) without extending this opinion too largely.

Perhaps enough has been shown to bring us to our conclusion, and the result at which we have arrived, after a careful consideration, is, that if the property were still in the hands of McGregor & Lawes, they must be regarded as holding it as in mortgage. And that the property having been sold by them to an innocent purchaser, for a valuable consideration, which they have received, they must stand accountable for the proceeds, and are chargeable for the residue, after the payment of their just demands.

Several questions of inferior moment are suggested in the progress of the case, but the foregoing views will cover all that is important, save such as connect themselves with the only remaining one, and that is, what are to be treated as the just demands of the respondents, McGregor & Lawes, or by what rules shall they be ascertained? These demands divide themselves into three classes. *First.* Their payments

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made to and for Howard, under the agreement made 18th of August, 1852. In other words, their bank account, amounting as claimed by them, to \$3,623.60. *Secondly.* Certain debts and demands paid by them, as set forth in the answer, amounting to \$2,378.01. *Thirdly.* The judgments assigned and paid on the rendering of the decree by the District Court in Muscatine county, and embraced in that decree, on the 18th of October, 1855, amounting to \$3,548.43. The defendants are entitled to the first class under the view which we take of the cause. If we could hold it tainted with fraud, so as to treat it as absolutely void, this would be different. Of their right to the second class, no question is made. On the third class, two remarks are to be made. These demands and their assignment, enter into and form a part of the decree rendered in Muscatine county, on the 18th of October, 1855, constituting the basis of the same. The other remark is, that they were judgments rendered prior to the petitioner's, and constitute prior liens on the property, and as would seem to us, they have been paid fairly and *bona fide* under the cognizance of the court. The second and third classes are, perhaps, sufficiently defined in the papers before us, and so far as they are concerned, it may be that a decree might be rendered in this court. But it is otherwise with the first class. Properly speaking, there is no evidence in the case upon them. The detail of proof is wanting, and we do not feel at liberty to undertake their adjudication. They require to be referred to a master, or dealt with in some other proper method, to ascertain the amount of debts and credits, and the interest due on the advances. And farther, we do not think it proper to determine, in anticipation, the rate of interest to be allowed. These matters are left open to the adjudication of the District Court.

The result of the inquiry directed in the following decree, may accord with and sustain the decree of the District Court, but that court has rendered its decision absolutely, without the inquiry, which we deem requisite. In other words, that court proceeds upon the ground of absolute

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fraud, whilst this only holds the party accountable, and subject to the payment of any balance remaining after the payment of their proper claims.

Decree reversed.

SELMAN v. COBB.

Where in an action by the indorsee of a promissory note, executed by the defendant to one E., who, by his attorney in fact, one S., indorsed the same to the plaintiff, the defendant pleaded that the note was not the property of the plaintiff, but of said S., which was denied by the replication; and where on the trial of the cause, the plaintiff offered said note in evidence, and thereupon the attorney of defendant asked to inspect the same, for which purpose it was handed to him; and where the said attorney, (who was also attorney for one L.), then handed the note to the sheriff, who was there present, and held an execution against S., in favor of L., with instructions to levy upon the same as the property of said S., which was accordingly done by the sheriff, and he then took said note into his possession; and where the plaintiff moved for a rule on the sheriff to deliver up said note, that it might be given in evidence on said trial, which rule the court refused to make, but permitted said plaintiff, against defendant's objection, to introduce copies of said note and the assignment, properly proven; *Held*, 1. That the court erred in refusing the rule, requiring the sheriff to surrender the note; 2. That secondary evidence of the note and assignment, was rendered necessary by the wrongful act of defendant; and that if its admission was erroneous, the defendant could not take advantage of the error.

Appeal from the Davis District Court.

PLAINTIFF claims to recover upon a promissory note executed by defendant to one Evans, who, by his attorney in fact, J. J. Selman, assigned the same to plaintiff. Defendant, among other things, pleads that said note is not the property of plaintiff, but of said J. J. Selman. This is denied in the replication. The cause was submitted to the court, and during the trial, as shown by the bill of exceptions, plaintiff offered said note in evidence, and thereupon the attorney for defendant, asked to inspect the same, and it was accordingly handed to him for that purpose. It ap-

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pears at that time, the sheriff had in his hands an execution against said J. J. Selman, in favor of one Lucas, and he being present, the attorney for defendant, (who was also the attorney of said Lucas), having the said note so as aforesaid for inspection, handed the same to said sheriff, with instructions to levy upon the same as the property of said J. J. Selman. The said sheriff accordingly made said levy, and took said note into his possession. The plaintiff thereupon moved for a rule on the sheriff to deliver up said note, that it might be given in evidence on said trial, which rule the court refused to make, but permitted said plaintiff against defendant's objection, to introduce copies of said note and assignment, properly proven, and this being all the evidence, judgment was rendered for plaintiff, and defendant appeals.

Trimble & Baker, for the appellant.

S. G. McAchran, for the appellee.

WRIGHT, C. J.—Appellant assigns for error the ruling of the court, in admitting a sworn copy of the note sued on in evidence, without sufficiently accounting for the absence of the original. In our opinion, defendant should not be permitted to avail himself of this objection. To permit him to do so, would be in effect to allow him to take advantage of what we esteem his own wrong. When this note was offered in evidence, it was the right of the defendant to inspect the same, with a view to present any objection, he might have to its introduction. He had a right to its temporary possession for this purpose, and it was the duty of the court to see that he used it for none other. He had no more right to hand it to the sheriff than to any other person. If he could deliver it to the officer, so he could put it into his own pocket, and defy the plaintiff to proceed with the trial. That he gave it to the sheriff for the purpose of having him levy upon it, is in no sense even an apology for not returning said note to plaintiff. If the note

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was in fact the property of J. J. Selman, and its proceeds should have gone to pay the debt of Lucas, or any other creditor of said Selman, there was another way, and more appropriate occasions, for ascertaining this, than the unusual and unwarranted method here attempted. In a commendable zeal to make a debt, from even the most tardy debtor, a party must not forget what is due to the court, nor attempt by an improper, though bold practice, to overreach his adversary. If the debtor has, with a fraudulent intent, transferred his property, there is a way to ascertain it, other than the one attempted in this case.

Prima facie, at least, this note was the property of plaintiff. It was indorsed to him, and was in his possession. If it was sought to subject it to the payment of the debts of the other Selman, a discovery might have been asked; plaintiff might have been called upon under oath by proper proceeding, to disclose how he held the same, or even after judgment thereon, legitimate steps might have been taken to develop the true character of the transaction. Neither Lucas or the defendant, however, had any right to assume that the note was not the property of plaintiff, and acting upon that assumption, to seize upon it under the circumstances here disclosed. But it is said, that when the attorney handed the note to the sheriff, he was acting as the attorney of Lucas, and not of defendant, and that the legal right of said defendant should not therefore be thereby prejudiced. This note, however, was handed to the attorney of defendant. He received it as such, and in the line of his duty in conducting his defence. It was in effect handed to defendant himself for inspection. The attorney had no more right to destroy it, to mutilate it, or to withhold it from plaintiff, than would the defendant himself. Having employed this attorney to conduct his defence, he was for the purposes of that trial, bound by his action. So far as the rights of the plaintiff are concerned, the attorney should be treated as acting alone for the defendant.

It is further insisted, however, that while the sheriff may have had no right to thus seize upon this note—while it may

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have been the duty of the attorney to return said note instead of handing it to the sheriff—still it was error to allow a copy of the same to go in evidence. What has already been said, substantially disposes of this objection. We think the court should, on the motion of plaintiff, have made the order, and required the sheriff to return said note. Of the failure to do so, the plaintiff, but not the defendant, might complain. So far then, the only party prejudiced was the plaintiff—and this prejudice occasioned by the act of the defendant. The plaintiff having thus exhausted his efforts to have his note returned—the defendant pertinaciously resisting his right to it, but insisting all the time that it was legally and in fact beyond his control, he then proposes to do the next thing in his power, and that was to introduce a copy. The defendant says, you cannot do this. It is true I have no right to the note. It is true that I got it into my possession for a legitimate purpose, and now without right retain it. It is true that you have called upon the court to order the officer having it in charge, to deliver it up, and this has been refused, and now because I have, by my own illegal act, placed it beyond your power to proceed in the regular way with your proof, you must, therefore, go out of court and be defeated in your action.

To our minds, such a practice would open a door to continual fraud, and would encourage a practice which should never be tolerated for a moment in our courts. Suppose at the moment this note was offered in evidence, it had dropped from the hands of the attorney into the flames, and been destroyed. Suppose that when handed to the attorney of defendant for examination, as was done in this case, said defendant had torn it into pieces. Or suppose again, that after thus delivering it to the opposite party, by some means before its return or introduction in evidence, it had been lost and could not be found, after the most diligent search. Would there be any doubt but that plaintiff would have a right, under such circumstances, to introduce a sworn copy of such note? We clearly think not. Let us go one step

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further, and suppose that the defendant, instead of destroying this note, had put it into his pocket, and refused to return it? Could he by so doing, defeat plaintiff's recovery? It would hardly be so claimed—but the answer would be, that he should have been required to deliver it up. Grant it, and when a rule to that effect is asked of the court, he resists it, and succeeds in obtaining a decision that he is not bound to give it up—a decision, however, that is wrong, and that does violence to plaintiff's rights—with what propriety or legal right can he still insist that the original, and not the copy, shall be introduced? It is his wrongful act that has driven the plaintiff to this alternative, and he should not be allowed to profit by it. Or let us suppose once more, that instead of keeping it in his own pocket, or passing it to an officer to have it levied upon to satisfy the debt of a person, not a party to the record, he had handed it to the officer having an execution against the plaintiff himself, would he not be equally without excuse?

The truth is, to return to the proposition with which we started out, the defendant (or what is the same thing, his attorney) received this note in the course of the trial for a particular purpose. It was no part of his business to know or inquire, in defending against said note, whether the creditor of some third party was or was not likely to collect his debt. Then it was attempted to assist such creditor by taking said note from its appropriate place in the case then on trial, and handing it to the sheriff. The defendant attempted to defeat plaintiff's recovery by a course both unusual and unwarranted, and if, as a consequence thereof, his adversary was compelled to resort to secondary evidence to supply the absence of such original paper, we feel constrained to say, that whatever of error there may have been, in allowing the introduction of such secondary proof, the defendant, at least, is in no situation to take advantage of it.

Judgment affirmed.

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ECKLES v. KINNEY.

After allowing a change of venue, the District Court cannot require the applicant to give to the adverse party, a bond to secure him against the additional costs which may be incurred by such change of venue.

Where, after a change of venue is ordered, the adverse party moves to re-docket the cause, and the party taking the change, makes no objection, but appears by his attorneys, and proceeds to the trial of the cause, he cannot assign for error in the appellate court, the decision of the court in re-docketing the cause.

Where the defendant in an action, filed an affidavit, and motion for a change of venue, on account of the interest and prejudice of the judge, which motion was granted at the May term, 1855, and an order of court made changing the venue to Warren county, in the ninth judicial district; and where at the same term, and after the change of venue had been ordered, the court ordered the defendant to give a bond, in the penalty of \$200, to secure the plaintiff in the additional costs to be incurred by the change of venue; and where at the September term of said court, on motion, the cause was re-docketed, and on the trial, both parties appearing, the jury disagreed, and the cause was continued; and where at the May term, 1856, the defendant filed an affidavit for a change of venue to some other county, for the reason that the inhabitants of Boone county, were so prejudiced against him, that he could not expect a fair and impartial trial, which application was overruled; *Held*, 1. That the court erred in requiring the defendant to execute a bond for the costs; 2. That section 1708 of the Code, which limits a party to one change of venue, did not apply to the case; and 3. That the court erred in overruling the second application for a change of venue.

Appeal from the Boone District Court.

SUIT to recover the value of one hundred walnut logs, the property of the plaintiff, of the value of three hundred dollars, alleged to have been taken and carried away by the defendant. The defendant answered, denying the claim to the logs set up by plaintiff, and issue being joined, the defendant filed an affidavit and motion, praying a change of venue, on account of interest and prejudice of the judge, to some other judicial district. The motion was granted, and at the May term, 1855, an order of court was made changing the venue to Warren county in the ninth judicial dis-

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trict. At the same term, and after the change of venue had been ordered, the court, on the application of the plaintiff, ordered the defendant to give a bond in the penalty of \$200, to secure the plaintiff in the additional cost to be incurred by the change of venue. At the September term ensuing, there was a motion to re-docket the cause, and it was re-docketed; and on a trial, both parties appearing, the jury disagreed, and the cause was continued. At the May term, 1856, the defendant filed an affidavit to obtain a change of venue, to some other county in the fifth district, because, as he alleged, the inhabitants of Boone county were so prejudiced against him, that he could not expect a fair and impartial trial in that county. The motion for a change of venue was overruled. The cause was heard at the May term, 1856, of the District Court of Boone county, and a judgment rendered for the plaintiff of \$42. Defendant appeals, and assigns these various rulings of the court as error.

T. Elwood & J. E. Jewett, for the appellant.

No appearance for the appellee.

STOCKTON, J.—The first assignment for error, is, that the District Court took cognizance of the cause, after an order had been made, changing the venue to the county of Warren. This cognizance, it is claimed, was assumed by the District Court:

1st. By ordering the defendant to give bond to secure the plaintiff in the additional costs to be incurred by the change of venue, after the order for the change of venue had been entered.

2d. By re-docketing the cause at a subsequent term, and trying it.

1. As to the first point, the court may, at the same term, reconsider the motion for a change of venue, and grant the same on such conditions only, as are allowed by law, and are in the discretion of the court. The costs occasioned by the change of venue, are to be paid by the applicant, and not taxed as part of the costs of the cause. The court may,

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as a condition of allowing the order for the change of venue, order that such costs shall be paid into court. But we do not think that the court can, after a change of venue has been allowed, order the applicant to give to the adverse party, a bond to secure him in the additional costs to be incurred by such change of venue. There is no law authorizing the court to make such requirement.

2. Although the defendant, after the order for the change of venue had been made, might well object to any order being made at a subsequent term to re-docket the cause; yet, as it appears that he made no objection in the case, and appeared in court by his attorneys, and went to trial, he cannot now assign the ruling of the District Court for error.

3. The second assignment of error, we think, is well taken. The affidavit states that, as defendant verily believes "the inhabitants of the county of Boone are so prejudiced against him, that he cannot expect an impartial trial in said county." This is in the words of the statute. Code, § 1706. Section 1708 of the Code, which limits the party to one change of venue, does not apply in this case, because, if for no other reason, the party had not in reality had a change of venue.

Judgment reversed.

ABRAHAMS v. THE STATE OF IOWA.

Where the offence on the part of those keeping a house of prostitution or lewdness, could only be prohibited by a legal prosecution, and where the occupants could in no sense be said to be so far under the control of the lessor, as that his mere dissent or order, would amount to a prohibition, his mere failure to act, or to prohibit, would not amount to a permission.

To make a lessor liable under section 2712 of the statute, for knowingly permitting the lessee to use his house for the purposes of prostitution and lewdness, there must be on the part of the lessor, a consent to such use, either expressly given, or given by his silent acquiescence.

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A mere failure to interfere or to prosecute, so as to prevent the illegal use, cannot be construed to amount to a permission, or into a silent, affirmative acquiescence in such use.

The State must show such acts or circumstances as shall satisfy the jury, that the lessor, having knowledge that the house was being used for the illegal purpose, after the execution of the lease, not only remained inactive, but assented or consented to such use; and it is not for the lessor to show, that he took some steps to manifest his dissent or disapprobation.

Where a party was indicted for having leased a house, knowing that the lessee intended to use the same as a place or resort for the purpose of prostitution and lewdness, and for having knowingly permitted such lessee to use the same for such purpose; and where the court instructed the jury as follows: "That if the defendant leased the premises for a legal and proper purpose, not knowing that it was to be used for an illegal purpose; but after the lease was executed, the lessees kept a place of prostitution and lewdness, and the defendant had knowledge of such illegal use, and *took no means to prevent the same*, he would be liable under the indictment;" *Held*, That the instruction was erroneous.

Error to the Des Moines District Court.

THE defendant was indicted for having leased a house, knowing that the lessee intended to use the same as a place or resort for the purpose of prostitution and lewdness, and for having knowingly permitted such lessee to use the same for such purpose. It would seem that there was no testimony to sustain the charge, that he leased the house with the knowledge that it would be so used; and that the prosecution relied for a conviction, upon the charge that he knowingly permitted the same. On this subject, the court instructed the jury, that if the defendant leased the premises for a legal and proper purpose, not knowing that it was to be used for an illegal purpose; but after the lease was executed, the lessees kept a place of prostitution and lewdness, and the defendant had knowledge of such illegal use, and took no means to prevent the same, he would be liable under the indictment. To this instruction, defendant excepted, and there being a verdict and judgment of guilty, he now prosecutes this writ of error.

J. C. & B. J. Hall, for plaintiff in error.

Saml. A. Rice, (Atty. Genl.) for the State.

WRIGHT, C. J.—The law provides that if any person let any house, knowing that the lessee intends to use it as a place or resort for the purpose of prostitution and lewdness, or knowingly permit such lessee to use the same for such purpose, he shall be punished by fine, &c. Code, § 2712. The material inquiry in the case, is, what is the true meaning of the word *permit*, as here used? We think the construction given it by the court below, improperly changes the burden of proof. This construction assumes, that if it is once shown that a lessor has knowledge that the premises leased, are used for the illegal purpose, he must show that he took some steps to prevent the same, if he would avoid liability. In our opinion, mere inaction on his part, or a failure to take some steps to prevent the illegal use, is not permitting it, in the sense contemplated in this section. The permission to do a particular thing, would imply an affirmative consent, or assent to it, rather than a failure to act to prevent it, or the want or absence of action. It is true that a failure to prohibit, may be said to amount to a license or permission to do a particular act; and in this sense, the word *permit* is sometimes used. But this is believed to be its secondary, rather than its primary signification. When thus used, it implies that the party has it in his immediate power to prevent the act or thing; and having failed to prohibit the same, it may well and safely be concluded, that he permitted it. When, however, as in the case before us, the offence on the part of those keeping the house, could only be prohibited by a legal prosecution; and where the occupants could in no sense be said to be so far under the control of the lessor, as that his mere dissent or order would amount to a prohibition, we cannot believe that his failure to act, or to prohibit, would amount to a permission.

To make the party liable under this statute, there must be on his part, a consent to such use, either expressly given, or given by his silent acquiescence. Where the consent is expressly given, there, of course, would be no difficulty in showing that he permitted the use. What shall be said to

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amount to a silent acquiescence, it is impossible to determine from any rule applicable to all cases which may arise. For the purposes of this case, it is sufficient to say, that a mere failure to interfere, or to prosecute, so as to prevent the illegal use, cannot be construed to amount to a permission, or into a silent affirmative acquiescence in such use. The State must show such acts or circumstances as shall satisfy the jury, that the lessor having knowledge that the house was being used for the illegal purpose, after the execution of the lease, not only remained inactive, but assented or consented to such use; and it is not for him to show, that he took some step to manifest his dissent or disapprobation.

Judgment reversed, and cause remanded for trial *de novo*.

TASKER v. MARSHALL.

Where in a proceeding seeking the specific performance of a contract for the conveyance of land, a controversy arose in the Supreme Court, whether the complainant had in the District Court, introduced certain receipts, (now lost) showing the payment of the purchase money; and where, upon the *ex parte* affidavits submitted by the parties, as to the fact in controversy, it was left in great doubt, whether such receipts had been produced and offered in evidence; *Held*, That the court might either determine the case upon the record and affidavits, or might, in the exercise of a sound discretion, remand the cause, for the purpose of having the District Court embody in a proper bill of exceptions, the facts as to the proof made on the hearing.

Appeal from the Muscatine District Court.

THE respondent made his bond for the sale and conveyance of certain real estate to plaintiff. For the consideration money, complainant executed his promissory notes, which were assigned by defendant, and judgments recovered thereon in the name of the assignees. The complainant brings this action, seeking a specific performance of said

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contract to convey, and in the event that respondent is not able to make title to said real estate, that he be required to respond in damages for such failure. A material question in the case is, whether said judgments, so recovered upon said notes, have or have not been satisfied. All of the testimony purports to be embodied in the record, but nothing is found tending to show the payment of said judgments. The complainant insists that on the trial below, he introduced certain receipts or instruments which proved conclusively such payments in writing, which receipts have, since said trial, been lost or mislaid, and cannot be produced on the hearing of this appeal. This is denied by respondent, he insisting that said judgments never were paid, and that no such evidence was introduced on the trial below, as is claimed by complainant. Under this state of the record, each party were permitted to introduce a number of *ex parte* affidavits, to support their respective positions. The court being called upon to determine the case, taking into consideration such affidavits, submitted the following opinion and order.

J. C. Hall, for the appellant.

Geo. C. Dixon, for the appellee.

WRIGHT, C. J.—The appellant in his argument, as originally submitted in writing, seeks to reverse the judgment below, alone upon the ground that the entire consideration money for the real estate sold by respondent, remains unpaid. It would seem that counsel for appellee submitted his argument, also in writing, without having seen that of appellant, for throughout he assumes such payment as a matter about which there was no controversy, and makes no response to the only point in defendant's brief. It being thus manifest to the court, that for some cause, one, if not both parties were laboring under a mistake as to what was contained in the record, we called their attention to the same, and this led to the filing of the affidavits referred to

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in the statement of the case. Several of these have been filed on each side. The point in controversy is, whether certain receipts or evidences of the payment of the judgments recovered for the consideration money, were introduced on the hearing of this case in the court below. The affiants appear to be quite clear and positive on each side of this question. To determine the case as it now stands, it appears to us might be at the great hazard of doing injustice to these parties. From the affidavits before us, we are at a great loss to determine whether said proof was in fact made. And yet there are many very strong circumstances, as well as positive statements, in favor of the position that said proof was made. If made, the receipts are lost by some means, not attributable to either party perhaps, and certainly not to complainant. Under such circumstances, we think it safer, and more likely to arrive at the truth in the premises, to remand the case, with instructions to ascertain and embody in a proper bill of exceptions or otherwise, the evidence upon this subject on the former trial, but for no other purpose. After they are thus heard, either party can bring the case to this court for final adjudication.

Acting upon the rule recognized in *Coffin v. Hammond*, 3 G. Greene, 241, we would entertain no doubt of our right to determine the case upon the record and affidavits before us. We are equally clear, that in the exercise of a sound discretion, it is entirely competent to remand the case for the purpose above indicated. It will, accordingly, be so remanded.

SALES v. THE WESTERN STAGE COMPANY.

It is the duty of stage proprietors, who run a line of coaches for the conveyance of passengers, to prepare good coaches, harness and horses, and good, skillful and careful drivers; and should they fail to do so, and their passengers are injured by such failure, they are responsible.

Carriers of passengers for hire, are not only to furnish good coaches, harness and horses, and skillful and careful drivers, but they are to keep them in good repair, and to see that their drivers drive with the *utmost* skill and prudence.

They are bound to exert the *utmost* skill and prudence, in conveying their passengers, and are responsible for the *slightest* negligence or want of skill, either in themselves or their servants.

They are bound to use such care and diligence, as a most careful and vigilant man would observe, in the exercise of the *utmost* prudence and foresight.

Appeal from the Van Buren District Court.

THIS action was brought to recover damages for an injury sustained by plaintiff, by the upsetting of a stage coach in which he was a passenger, and of which the defendants were the proprietors. On the trial, certain instructions were given, (for which see the opinion of the court,) to which defendants excepted, and the verdict and judgment being against them, they now appeal.

Clinton & Fisker, and Knapp, Caldwell & Wright, for the appellants.

C. Negus, for the appellee.

WRIGHT, C. J.—Various exceptions were taken to the decisions and proceedings of the court below, but appellants now expressly waive all other error, and seek to reverse this case, upon the single ground that the rule given to the jury, as to the care, skill and diligence required of them, as carriers of passengers for hire, was incorrect, and not warranted by the authorities. The instructions objected to, are

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as follows: "It is the duty of stage proprietors who run a line of coaches for the conveyance of passengers, to prepare good coaches, harness and horses, and good, skillful and careful drivers; and should they fail to do so, and their passengers are injured by such failure, the proprietors are responsible. They are not only to furnish good coaches, harness, horses, and skillful and careful drivers, but they are to keep them in good repair, and are to see that their drivers drive with the *utmost* skill and prudence. Carriers of passengers for hire are bound to exert the *utmost* skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skill either in themselves or their servants. They are bound to use such care and diligence as a most careful and vigilant man would observe, in the exercise of the *utmost* prudence and foresight."

It is objected, that by the use of the words "*utmost*" and "*slightest*," too high a degree of diligence and care is required of this class of carriers. A brief examination of the authorities, however, will show most conclusively, that the rule laid down, is well sustained by the earlier as well as later cases. We need do nothing more than refer to a few of them. What is said, as to the duty of such carriers, to furnish good coaches, harness and horses, and of their being required to keep them in repair, and of their further duty to furnish good and skillful drivers, is taken, almost word for word, from the case of *McKinney v. Niel*, 1 McLean, 550, in which this language will be found: "He (the stage proprietor) is bound to provide good coaches, and harness, gentle and well broke horses, and a skillful and careful driver. These are obligations which the law imposes on every stage proprietor; and if any injury is received by a passenger from any defect in this preparation, the proprietor is responsible." To the same effect are the following, among other authorities: Story on Bailments, §§ 592, 593; *Crofts v. Waterhouse*, 3 Bing. 314; Angell on Carriers, §§ 534, 535, 540; *Peck v. Niel*, 3 McLean, 22; *Stokes v. Salstonstall*, 13 Pet. 181; 2 Kent, 601; 2 Greenl. Ev. § 221; *Ingalls v. Bills*, 9 Met. 1. Again, while the common carrier of goods and

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chattels, is held liable for all damages which do not fall within the excepted cases of the act of God and the public enemy, the carrier of passengers is not held responsible to the same extent, so far at least as relates to the persons of his passengers, but he is bound to the *utmost* care and diligence of very cautious persons, and is responsible for any, even the *slightest* neglect. Story on Bailments, § 601; *Christie v. Griggs*, 2 Camp. 79; Angell on Carriers, 568, 570; 13 Peters, 181; *Boyce v. Anderson*, 2 Pet. 155. A few extracts from these authorities, will suffice to show how uniform and well settled the rule is upon this subject.

In reference to the duty of such carriers in respect to the character and competency of their servants, there is an entire correspondence between the English and American authorities, and this duty is thus laid down in 3 McLean, 22: "He that establishes a line for the conveyance of passengers, and who holds out inducements to persons to travel in his vehicles, for which compensation is charged, is bound to have skillful and prudent drivers, and the *utmost* skill and prudence of the driver must be exercised to avoid accidents." And see 3 Bing. 321; *Farwell v. B. & W. Railroad Co.*, 4 Met. 49; *Carpue v. London & B. Railway Co.*, 5 A. & E. 747. So in Angell on Carriers, § 568, it is said, that the nature of their undertaking is to carry safely and securely, and though they do not impliedly warrant the safety of passengers at all events, yet they are bound to the *utmost* care and skill in the performance of their duty. The term here used expresses the idea of something beyond *ordinary* care. The degree of their responsibility, therefore, is not *ordinary* care, which will make them liable for only *ordinary* neglect, but *extraordinary* care, which renders them liable for *slight* neglect.

So BARBOUR, J., in *Stokes v. Saltonstall*, 13 Pet. 181, says, the stage proprietor must have a driver of competent skill, of good habits, and in every respect qualified, and suitably prepared for the business in which he is engaged. Such driver must act with reasonable skill, and with the *utmost* prudence and caution; and if an injury is occasioned

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by the *least* negligence, or want of skill or prudence, on his part, the proprietor is liable. While such carriers do not warrant the safety of their passengers at all events, yet their undertaking and liability go to the extent that they and their agents possess competent skill, and that as far as human foresight can go, such passengers shall be transported safely. And in *Astor v. Heaver*, 2 Esp. Rep. 583, it is said that the carrier is not liable where there has been *no* negligence or default in the driver, but he is answerable for the *smallest* negligence of such driver. In Story on Bailments, § 601, the inquiry is made whether such carriers are bound to *ordinary* care and diligence, and liable for only ordinary neglect, or are they bound to *extraordinary* care, and liable for slight neglect. The answer is given in these words: "Passenger carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go, that is—for the *utmost* care and diligence of very cautious persons, and of course they are responsible for any, even the *slightest* negligence." And so in *McKinney v. Niel*, 1 McLean, 540, "the driver must not only be skillful, but he is bound to exercise the *utmost* degree of care. The *least* degree of imprudence, or want of care on his part, fixes the liability of his employers." And see *Camden & Amboy Railroad Co. v. Burke*, 13 Wend. 626. And finally, in 9 Metcalf, 1, it is said: "That carriers of passengers for hire, are bound to use the *utmost* care and diligence in the providing of safe, sufficient and suitable coaches, harness, horses and coachmen, in order to prevent those injuries which human foresight can guard against; and that if an accident happens from a defect in the coach which might have been discovered and remedied upon the most careful and thorough examination of the coach, such accident must be ascribed to negligence, for which the owner is liable, in case of injury to a passenger happening by reason of such accident." And see the following cases to the same effect: *Ware v. Gay*, 11 Pickering, 106; *Ross v. Hill*, 2 Man. Granger & S. 877; *Laing v. Colden*, 8 Barr. 479; *Hall v. Conn. Steamboat Co.*, 13 Conn. 319.

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We see nothing in the instructions given in this case, but what is fully warranted from the foregoing authorities, and we have found none holding a less stringent rule.

Judgment affirmed.

ADAMS v. PECK.

Where a demurrer is waived by the filing of an answer, no errors can be assigned in the appellate court, upon the judgment of the District Court, overruling the demurrer.

An affidavit for a continuance, on the ground of the absence of witnesses, that does not show that any diligence has been used to obtain the testimony of such witnesses, nor any excuse for the want of such diligence, is insufficient.

Where a motion is made to suppress depositions, on the ground that the party was not allowed time for travel, from the place where the notice was served, to the place where the depositions were to be taken, in addition to the five days' notice allowed by the statute, the party making the motion, must show affirmatively that he is entitled to the additional time allowed for travel.

Appeal from the Jasper District Court.

THIS was a suit against husband and wife jointly, for the price of goods, ware and merchandise alleged to have been sold and delivered to them, for the use of their family. A demurrer to the petition was overruled. The defendants then filed their answer, denying any indebtedness to plaintiff as charged. A motion to suppress depositions taken by plaintiff, and a motion by defendants for a continuance, were overruled. Judgment for the plaintiff for \$238.56. Defendants appeal. The other facts are sufficiently stated in the opinion of the court.

S. A. Rice & W. B. Sloan, for the appellants.

No appearance for plaintiff.

STOCKTON, J.—The demurrer was waived by the subse-

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quent answer, and no errors can be assigned in this court, upon the judgment of the District Court overruling the same.

The motion for a continuance upon the affidavit of Elizabeth Peck, one of the defendants, was properly overruled. The affidavit does not show that any diligence had been used to obtain, by deposition or otherwise, the testimony of Elias R. Peck, to the facts which it is stated by the affidavit, the defendants could prove by no other person. It appears that the said Peck was unwell, and confined to his bed. This fact may have been known in sufficient time, before the setting of the court, or before the trial, to have enabled the defendants to take his deposition. As no reason or excuse for the failure is shown, there was no sufficient reason for a continuance.

The remaining error assigned, is upon the overruling of the defendant's motion to suppress the depositions of Head and Cook, taken by plaintiff. The motion was based on the alleged insufficiency of the notice. The notice was served on defendants, September 1st, and informed them that the depositions would be taken September 6th, and they were taken on that day. It is claimed by defendants that, in addition to the five days intervening between the 1st and the 6th of the month, computing the time in accordance with the rule prescribed by the Code, (§ 2513,) they were entitled to one day in addition, as the time allowed for travel from the place where the notice was served, to the place where the depositions were to be taken. Code, § 2453. The defendants do not show affirmatively, that they are entitled to the additional day allowed for travel. The depositions were to be taken in Jasper county, where the suit was brought; and although it does not appear that they were to be taken at the seat of justice for the county, yet, on the other hand, it does not appear that any travel was necessary to be made from the place where the defendant lived, or the place where the notice was served, to the place where, according to the notice, the depositions were to be

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taken. The duty of showing this, devolved on the defendants, before they could ask the court to suppress the depositions.

Judgment affirmed.

THE DES MOINES NAVIGATION AND RAILROAD COMPANY
v. DORAN.

An original notice in an action of trespass *quare clausum fregit*, as follows :

"To G. D. : Sir—You are hereby notified that there is now on file in the office of the clerk of the District Court of Boone county, state of Iowa, a petition of the Des Moines Navigation and Railroad Company, claiming of you the sum of five hundred dollars, as money due for your trespasses upon, and injuries done, certain parcels of real estate of said petitioner ; and that unless you appear and answer thereto, on or before the morning of the second day of the next term of the District Court of Boone county, state of Iowa, judgment will be rendered against you thereon," and signed by the attorneys of the plaintiff, is sufficient.

An original notice need not be as full and specific as the petition.

Appeal from the Boone District Court.

THIS was an action for a trespass upon certain lands, described by congressional numbers, and the trespass is laid in Boone county. The original notice was as follows :

"To George Doran :

"Sir—You are hereby notified that there is now on file in the office of the clerk of the District Court of Boone county, state of Iowa, a petition of the Des Moines Navigation and Railroad Company, claiming of you the sum of five hundred dollars, as money due for your trespasses upon, and injuries done, certain parcels of real estate of said petitioner, and that unless you appear and answer thereto on or before the morning of the second day of the next term of the District Court of Boone county, state of Iowa, judgment will be rendered against you thereon.

"HOLCOMBE & BEAL, Attys. for plaintiff."

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The defendant moved to "dissolve" the notice, for reason, first, that it does not follow the petition; second, that it does not set forth any day on which the trespass was committed, nor the county and state; third, that it is vague and uncertain. The court sustained this motion, and dismissed the cause. This is assigned as error.

Knapp, Caldwell & Wright, for the appellant.

George Doran, *pro. se.*

WOODWARD, J.—The petition or declaration sets forth the particulars of the trespass, with the regularity and technicality of a declaration at common law, giving the day, and laying the venue properly. The notice is sufficient. It need not be as full and specific as the petition. This one is as definite as seems to be required by the Code, Chap. 135.

The judgment of the District Court is reversed, and the cause is remanded.

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Where it appeared from the transcript of a record in a criminal case, that the indictment had been presented in open court, by the foreman, in the presence of the grand jury; that the defendant appeared by counsel, and pleaded not guilty; and that there was a trial; and where it did not appear that the indictment was indorsed a true bill, nor that it was marked filed by the clerk; *Held*, That the defendant, by pleading and going to trial, waived the objection to the indictment.

Where a party is convicted of an assault and battery, a judgment may be rendered against him in his absence.

Where a judgment in a criminal case, rendered in the Marshall District Court, after adjudging that the State recover a fine of two hundred dollars, and that execution issue therefor, contained the following provision: "And further be it ordered, that the clerk make out a mittimus to the sheriff of Polk county, to confine the body of the prisoner in the Polk county jail, for the space of six months;" *Held*, 1. That the judgment was irregular in

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form, but that its meaning was, that the defendant be imprisoned for the time specified therein, besides paying the fine of two hundred dollars; 2. That as the record did not show that there was a sufficient jail in the county where the judgment was rendered, the presumption was in favor of the regularity of the proceedings of the court below, and the court could not say there was error in directing the imprisonment of the defendant in a different county.

Error to the Marshall District Court.

INDICTMENT for assault and battery. The facts of the case will be found fully stated in the opinion of the court.

James D. Templin, for the plaintiff in error.

Delos Arnold and *S. A. Rice*, (Atty. Genl.) for the State.

WOODWARD, J.—A complaint was filed before a magistrate against the defendant, for an assault with intent to kill. He was recognized to appear at the District Court, where an indictment was found for an assault and battery. The defendant pleaded not guilty, and on trial, was sentenced to pay a fine of two hundred dollars. The case does not show any motion or demurrer made—any instructions asked—nor a bill of exceptions taken, upon any ground. After verdict, the defendant filed a motion of the following tenor: first, to set aside the judgment, as the same is contrary to evidence and verdict; second, to arrest the judgment; third, the fine is excessive, and contrary to the evidence and the law in the case; fourth, the imprisonment is excessive. This third and fourth allegation, would seem to be designed as specifications under the second ground of motion. The errors now assigned in this court, are the following in substance:

First. That the court erred in rendering judgment upon a verdict found upon a paper purporting to be an indictment, but which does not appear to have been filed in the court, nor indorsed a true bill, nor to have been properly

found by a grand jury, and which cannot support a judgment rendered thereon.

The bill of indictment appears to have been presented in open court, by the foreman, in the presence of the grand jury; but the transcript of record does not show that it was indorsed a true bill, nor that it was marked filed by the clerk. But the defendant pleaded not guilty, and appeared, at least, by counsel, and there was a trial. Thus far, there was a waiver of the objection. Perhaps, however, he could take advantage of it in arrest, but did he do so? The motion in arrest of judgment does not make this one of the grounds. And it is too late to take the exception now for the first time, on assigning errors in this court. There has been no foundation laid below. No objection was made there.

The second error alleged is in rendering judgment in the absence of the defendant. It does not appear clearly that this was the case; but if it were so, the offense charged being a misdemeanor, judgment could be rendered in the defendant's absence, by section 3059 of the Code.

The third and fourth assignment of errors, relate to the ordering a mittimus to issue to the sheriff of Polk county, instead of the sheriff of Marshall county; and also allege error in ordering a mittimus when there was no judgment or sentence of imprisonment. The judgment is somewhat irregular in its form. After adjudging that the state recover the fine of two hundred dollars, and that execution issue therefor, it proceeds: "And farther, be it ordered that the clerk make out a mittimus to the sheriff of Polk county, to confine the body of the prisoner, in the Polk county jail, for the space of six months." It is difficult to attach any other meaning to this clause of the judgment, than that the defendant be imprisoned for the time therein named, besides paying a fine of two hundred dollars. Then, the law provides, that when the county in which the prisoner should properly be confined, has no sufficient jail, the court may direct his committal to the jail of some other convenient county. Code, § 3073. And as the defendant has not shown, by bill of exceptions or otherwise, that there was a

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sufficient jail in Marshall county, and as the presumption is in favor of the regularity of the proceeding of the court, we cannot say that there was error in directing his imprisonment in Polk county.

The judgment of the District Court is affirmed.

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Replevin may be sustained on the right of possession of property, without reference to the ownership or right of property.

Where, in an action of replevin, the plaintiff asked the court to instruct the jury as follows: "1. That it is not necessary in replevin, that the plaintiff should prove that he is the rightful owner of the property replevied. If he had the peaceable possession, his right of possession was good against every person, but the real owner, or some one having a better right of possession. 2. That if the plaintiff had possession of the property, his right of possession is good against all persons, until a better right is proved by some other person," which instructions the court refused to give; *Held*, That the court erred in refusing to give the instructions.

Appeal from the Davis District Court.

REPLEVIN for a hog, to the possession of which plaintiff avers he is entitled, and which is wrongfully detained from him by defendant. The defendant, by his answer, alleges that the hog is not the property of plaintiff, but is the property of defendant. The action was commenced before a justice of the peace, and the judgment rendered in favor of defendant. On appeal to the District Court, the plaintiff excepts to the instructions of the court, given at the request of the defendant, and to the refusal to give certain instructions asked by plaintiff. Judgment being rendered for defendant, the plaintiff appeals. The instructions will be found in the opinion of the court.

Palmer & Trimble, for the appellant.

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No appearance for the appellee.

STOCKTON, J.—The District Court erred in refusing to charge the jury as requested by the plaintiff. The question involved is, whether the plaintiff can maintain the action of replevin, on his right of possession, without reference to the ownership or right of property. On this subject, we entertain no doubt. The question has been set at rest by numerous adjudicated cases, and our own Code, if there was still any room for doubt, has spoken authoritatively. One entitled to the present possession, where the property is wrongfully detained from him, may maintain the action, even against the rightful owner. Code, § 1995. *Pangburn v. Partridge*, 7 Johnson, 140; *Smith v. Williamson*, 1 Binney, 147; *Mead v. Kilday*, 2 Watts, 110.

In the present case, the District Court refused to instruct the jury at the request of the plaintiff: 1. That it is not necessary, in replevin, that the plaintiff should prove that he is the rightful owner of the property replevied. If he had the peaceable possession, his right of possession was good against every person but the real owner, or some one having the better right of possession. 2. If the plaintiff had possession of the property, his right of possession is good against all persons, until a better right is proved by some other person. The refusal to give these instructions was erroneous.

It is true, that the court afterwards charged the jury, that "it made no difference who was the owner of the hog, if the plaintiff had the right to its possession." This instruction was not only in contradiction to the ruling of the court, in its refusal to give the first instruction asked by the plaintiff, and thereby tending to confuse the minds of the jury; but it was given in connection with the written charge of the court, in which the jury are told that, "the plaintiff claims that at the time of the commencement of the suit, he was the owner, and entitled to the possession of the hog," and that the jury "must first inquire, whether the hog in controversy is the property of the plaintiff." So that it

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was impossible for the jury rightly to know whether they were to try the question of the right of property, or the right of possession in the hog. The plaintiff, in his petition, only claims to recover on his right to the present possession of the hog, and its wrongful detention by the defendant, and not on his right of property. The District Court had no right to charge the jury that the plaintiff sued for the right of property, and that they must first inquire whether the hog was his property.

Judgment reversed.

4	559
108	608

GRIMSTEAD v. BRIGGS.

The alteration of a promissory note, with the assent of the maker, at the time of, or after, the alteration, does not render it void.

Where in an action on a promissory note, by the indorsee against the makers and indorser, it appeared from the evidence, that the note was made on the 29th of July, 1856, and was due on the first of November following; that the note, at the time of its execution, did not contain the words, "with ten per cent. interest;" that the words were inserted after the execution of the note, but by whom, or at what precise time, is not known; that before the maturity of the note, J., one of the makers, left the state, and was insolvent; that between the first and tenth of November, 1856, B., the other maker of the note, called upon the attorney of the plaintiff, for the purpose of getting the same to send to the residence of his co-maker, for payment; that the note was delivered to him, he giving a receipt therefor, at which time the note contained said specification as to interest; that B. recommended plaintiff to buy the note; that after B. knew of the alteration of the note, he instructed plaintiff's attorney, to bring suit thereon; and that he, at no time, before the commencement of the suit, made any objection to the alteration of the note; *Held*, That the assent of B. to the alteration, might have been reasonably inferred, and that he was liable to pay the note.

Appeal from the Davis District Court.

JOHNSON & Briggs made their promissory note to one Berger, who indorsed the same to plaintiff. The makers and indorser being sued, Johnson not being served, the ma-

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terial question in the case, arose upon the liability of defendant Briggs. The cause was submitted to the court, and the facts found as follows: The note was made on the 29th of July, 1856, and was due on the first day of the next November, but at the time of its execution, did not contain the words, "with ten per cent. interest," which words were inserted after its execution, but by whom, or at what precise time, was not shown, and did not appear. Before the maturity of the note, Johnson left the state, and was insolvent. Between the 1st and 10th of November, 1856, Briggs called upon the attorney of plaintiff, who held the note for collection, for the purpose of getting the same to send to the residence of Johnson, for payment. The note was delivered to him as requested, he giving a receipt therefor; the note at that time containing the said specification as to interest. No objection was made by either of said defendants, on account of said alteration, until after the commencement of this suit. It is further found that "defendant Briggs recommended plaintiff to buy said note, and after he knew of the alteration thereof, instructed plaintiff's attorney to bring suit thereon, and at that time, made no objection to said note on account of said alteration." From these facts, the court found for plaintiff, and rendered judgment against Briggs for the full amount of the note, with interest, and he now appeals.

Jones & Trimble, for the appellant.

D. P. Palmer, for appellee.

WRIGHT, C. J.—We see no good reason for disturbing this judgment. From the facts found, we think the court below was fully justified in concluding, that the defendant Briggs, either assented to said alteration at the time it was made, or if not, that having advised the plaintiff, to purchase the same, after, as is fairly inferable, he knew of said alteration, he is estopped, as against said plaintiff, from insisting upon the same, as a defence in this action. If the altera-

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tion was made with his knowledge and consent, the note would not, as assumed by appellant, become void, by reason of such addition or change. This assent would make it his instrument, as fully and entirely as if the words had been inserted at the time of its execution. As already stated, such assent could be reasonably inferred from the facts as found by the court below. Chitty on Bills, 204. But when, in addition to this, we take into consideration the fact, that plaintiff was advised by defendant Briggs, to purchase the note, every pretence for a defence of this character is taken away.

Judgment affirmed.

THE STATE OF IOWA, *ex rel.* LEWIS v. YOUNG.

A notice of an election, published on the morning of the day on which the election is to be held, is no notice, in any legal and proper sense.

Where an act for the incorporation of a city, provided that the act shall take effect from and after its publication in certain newspapers named therein, and required the trustees of the township in which the city was situate, to cause a vote to be taken on the acceptance of said city charter, in the manner in which township elections are now called and holden, and also fixed the day on which such vote was to be taken, and required such election to be held between the hours of nine and ten, A. M., and four o'clock, P. M. of said day; and where the act was published in one of the papers on the 13th of February, 1857, and in an *extra* of the other paper, on the 16th of February, the day fixed in the act for taking the vote on accepting said charter, and before ten o'clock of said day, about 250 copies of said extra were circulated in said city; and where the only notice of said election on the adoption of the charter, was contained in said extra, issued on the morning of the election—at which election the said charter was adopted; *Held*, That the act contemplated that the township trustees should direct and fix the manner of calling and holding said election, and that the notice given, complied with neither the letter nor the spirit of the law.

Appeal from the Johnson District Court.

THIS was an agreed case, submitted to the District Court
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of Johnson county, involving the right of the appellant (Young) to hold and exercise the office of mayor in the city of Washington, in this state. The court below having decided adverse to such right, the defendant appeals. The material facts will appear from the opinion.

Clarke & Henley, for the appellant.

Joseph R. Lewis, for the appellee.

WRIGHT, C. J.—On the 20th of January, 1857, an act was passed providing for the incorporation of the city of Washington, Washington county. By the last section of said act, it is provided that the same shall take effect from and after its publication in the Iowa City Republican and Washington Press. Section 44 requires “the trustees of Washington township, to cause a vote to be taken on the acceptance of said charter, (or act of incorporation,) in the manner in which township elections are now called and holden, in which the vote shall be for the charter, or against the charter, and shall be by ballot.” If the vote resulted in favor of the charter, it was to be so declared, and thenceforth the same to be taken as accepted. The said election to be held between the hours of 9 and 10 o'clock, A. M. and 4 o'clock, P. M. on the 3d Monday (the 16th) February, 1857. It is admitted that this act was published in the Republican on the 13th, and in the Press *extra*, on the 16th of February; that before the hour of 10 o'clock, of said 16th, there was about 250 copies of said *extra*, circulated in said town of Washington; that a vote was taken on that day, upon the acceptance of said charter; and that such vote was in favor of the same, and the result being so declared, the defendant was afterwards, on the 1st Monday in March, 1857, under said charter, so treated as accepted, elected mayor, and entered upon the discharge of his duties. It is also admitted that the only notice given of said election, on the adoption of said charter, was contained in the

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said Press *extra*, issued on the morning of the taking of said vote.

This case is submitted to us without argument, and we are totally unadvised of the grounds assumed by the different parties. Several objections suggest themselves, as probably obtaining to the right of the defendant to exercise this office, but we shall refer to but one. The vote on the acceptance of said city charter, was to be taken in the same manner in which township elections are called and holden. The *calling* of an election, evidently contemplates some *notice*. After the organization of a township, it is believed, that with reference to the election of the usual officers chosen at an April election, the length of time required for such notice, is to be determined by the township trustees. Code, § 222. When a new township is organized, notice is required to be given for fifteen days prior to the first election. Sections 231, 232 and 233. If the notice or *calling* for the vote on the acceptance of this charter, is to be regulated by these last sections, then it is manifest that it was entirely insufficient, and that there could be no legal vote thereon. And if governed by the notice contemplated to be given by the trustees at the township elections, subsequent to the organization, we also think it was insufficient. A notice of an election published on the morning of the day on which the election is held, is no notice—or, at least, none in any legal or proper sense. We think that this act contemplated, that the trustees should give *notice* of said election—that they should direct and fix the manner of *calling* and holding the same, and that the notice given, complied with neither the letter nor spirit of the law. To recognize the validity of such a notice, and to say that the citizens of a particular locality, may have a charter, though ever so obnoxious, fastened upon them by a vote taken under such circumstances, we think would be dangerous in the extreme. In the present case, there is perhaps nothing obnoxious in the charter, and the election holden may correctly express public sentiment in that place in relation thereto, but this cannot change the principle that should obtain, when one is

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sought for applicable to all cases. We conclude, therefore, that there was no legal election on the adoption of said charter; and that as a consequence, there was no act of incorporation authorizing the election of a mayor.

Judgment affirmed.

ELLIOTT v. CORBIN.

Where an original notice in an action commenced in the District Court, by the indorsee of a promissory note, read as follows: "To J. C.—Sir: You are hereby notified that there is now on file in the office of the clerk of the District Court of B. county, Iowa, a petition of E. E., claiming of you the sum of thirty dollars, as money due on a promissory note; and that unless you appear and answer thereto, on or before the second day of the next term of said court, judgment will be rendered against you thereon," which was signed by the attorneys of the plaintiff; and where the defendant moved to quash the notice, because: 1. The said notice does not set forth sufficiently the nature of the claim against the defendant; 2. Said notice does not state that the note sued on, was assigned by the payee, or any one else, which motion was sustained by the court, and the cause continued; *Held*, That the notice informed the defendant of all that the law deemed requisite, to put the defendant upon his defence; and that the court erred in quashing the notice.

A party may appeal from an order of the District Court, quashing an original notice.

Appeal from the Boone District Court.

THIS was a suit by plaintiff as holder, against defendant as maker, of a promissory note, payable to L. J. Royster or bearer. The defendant moved to quash the notice, and continue the cause, because the original notice did not show that the note had been assigned to plaintiff by Royster, and did not sufficiently advise the defendant of the nature of the claim against him. The original notice reads as follows:

"To James Corbin:

"Sir—You are hereby notified that there is now on file in the office of the clerk of the District Court in Boone county, Iowa, the petition of Ellis Elliott, claiming of you the sum of thirty dollars, as money due on a promissory note; and

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that unless you appear and answer thereto on or before the second day of the next term of said court, judgment will be rendered against you thereon.

“ELLIS ELLIOTT, *Plaintiff*.”

The District Court sustained the motion, and continued the cause, at the costs of the plaintiff, from which decision he appeals.

J. C. Knapp, for the appellant.

J. C. Hall, for the appellee.

STOCKTON, J.—A promissory note, made payable to bearer, is negotiable, and transferable by delivery only, and needs no indorsement; any person bearing or presenting the note, becoming in that case, the party to whom the maker of the note promises to pay it. The holder is presumed to be the owner, for consideration. So, the note in this suit, being payable to L. J. Royster or bearer, the plaintiff, as the holder, is presumed to be the owner. *Oreighton v. Gordon*, Morris, 41; *Hotchkiss v. Thompson*, Ib. 156; *Shelton v. Sherfey*, 3 G. Greene, 108; *Wilbur v. Turner*, 5 Pick. 526; *Dole v. Weeks*, 4 Mass. 451. The notice to defendant in this case, was sufficient. The maker of a promissory note, payable to another or bearer, must be presumed to know that the property in the note passes by delivery, and he must reckon on the possibility, at least, of payment being demanded by some one, not the original payee. The notice informs defendant of all that the law deems requisite, in order to put him upon his defence. It was not necessary that it should describe the note sued on, as made payable to Royster or bearer, and duly transferred and delivered to plaintiff.

The question as to the right of the party to appeal from the order quashing the notice, and continuing the cause, was decided by this court, in the case of *Worster, Templin, &c. v. Oliver*, *Ante*, 345. We think there can be no doubt of the right of the plaintiff to appeal.

Judgment reversed.

Ford v. Jefferson County.

FORD v. JEFFERSON COUNTY.

Where an account against a county, was rejected by the county court, from which decision, an appeal was taken to the District Court; and where the said county filed an answer in the District Court, pleading a set-off, and a former adjudication; and where the plaintiff moved to strike the answer from the files, for the reason that no pleadings can be filed after appeal, which motion was overruled by the court; *Held*, That the court did not err in refusing to strike out the answer.

Appeal from the Keokuk District Court.

FORD filed with the county judge, an account against Jefferson county, the items of which are set down, amounting to fifteen thousand and one hundred and eighteen dollars and thirty-seven cents. The whole of the claim was rejected, and the plaintiff appealed. On the filing of the appeal in the District Court, the defendant county filed an answer, embracing a set-off, with their bill of particulars, amounting to twenty thousand and fifty-nine dollars and twenty-nine cents. The answer also sets up a settlement and payment, and pleads a former adjudication of the matters involved. The plaintiff moved to strike out the answer, upon the ground that no pleadings can be filed after appeal, which motion was overruled. From this decision, the plaintiff appeals.

Charles Negus, for the appellant.

James F. Wilson, for the appellee.

WOODWARD, J.[1]—The error assigned relates to the refusal to strike from the files, the paper called an answer. The question is, whether in this, and similar cases, any

[1] WRIGHT, C. J., having been of counsel, took no part in this case.

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pleadings can be made in the District Court, after appeal. The commonly received doctrine, and one which has been recognized by this court, is, that unliquidated claims against a county must be presented to the county judge for allowance; and if rejected, the claimant must appeal, and cannot commence an action in the ordinary manner. Can a pleading be filed, or can the defendant answer in such cases, after appeal?

It is manifest that no answer or defence can be made when the claim is presented to the county judge. At that stage of it, the transaction is like presenting an account to an individual. The judge admits in full, or in part, or rejects. Then comes an appeal. Perhaps the plaintiff's argument is intended to be, that as there was no answer filed, (before the county judge perhaps,) the claim must be taken as admitted. But this is not so. There could be no answer made when the claim was before the judge. On his examination of it, or on his knowledge of it, he admits or rejects. When the cause comes into the District Court upon appeal, either the whole defence must lie open, without pleading to confine and govern it, or else pleading must be allowed after appeal—regarding the matter as a cause then commenced in the higher court. The statute is silent, and it is a subject for judicial construction. But it is to be remembered that it is possible for the pleadings to be either oral or in writing, as before a justice of the peace, or they may be thrown open, and stand unlimited, without any statement of them. It would seem that it was not a matter of complaint for the plaintiff, if the defendant has reduced his defence to writing, and set it down specifically and in order. And this is all that we are in reality called upon to decide. The question is not, whether the defendant *must* so answer, but whether, having so answered, the court erred in refusing to reject the answer. If rejected, what did the plaintiff expect? Was it that the cause would stand as one unanswered, or on default? This would not follow, but all matters of answer and defence would be open, undefined and unlimited. The question is *sui generis*. It is novel.

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We will not at this time assume to determine whether the defendant *must* answer in such case, but will only say that the court did not err in refusing to strike out the answer.

Judgment affirmed.

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ACRES v. HANCOCK.

Where a plaintiff dismisses his suit, he is liable for all the costs legally made in the case, and not alone for those that may be taxed at the time the suit is dismissed.

A plaintiff cannot, by dismissing his suit, and paying costs before the return of the writs and process in the hands of the officer, avoid the payment of the costs made thereon.

Where a transcript from a justice of the peace, does not show the amount of the costs in the case, the District Court may require the justice to certify to that court, the amount of such costs.

Appeal from the Delaware District Court.

THIS case was commenced before a justice of the peace, and taken by plaintiffs to the District Court by writ of error. From the return of the justice, it is shown that on the 4th of November, 1854, the plaintiffs filed their petition, under oath, alleging that defendant forcibly detained the possession of a certain house, and that notice issued, and was delivered to plaintiffs, returnable on the 8th of the same month, at 10 o'clock, A. M.; that a subpoena was issued on the part of defendant, and on the 7th, at defendant's request, a venire for a jury. On the 8th, between 9 and 10 o'clock, A. M., "the plaintiffs appeared and withdrew their suit, and paid all the costs charged on the docket to that time. Subsequently, (and about 12 o'clock, as the justice states,) the venire was returned; the defendant asked a nonsuit; and the plaintiffs claimed that they were only bound for the costs charged on the docket, at the time they withdrew their suit. The magistrate adjudged plaintiffs to be in default,

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and that they pay the costs. It appears that the transcript of the magistrate did not show the amount of the costs, nor that he rendered judgment for any specific sum; that the District Court permitted him to certify, by way of amended return, the fee bill; and for the amount so certified, and the costs in that court, rendered judgment for the defendant. The plaintiffs appeal.

A. E. House, for the appellants.

No appearance for the appellee.

WRIGHT, C. J.—Appellants claim that the District Court erred in affirming the proceedings before the justice, because the justice erred in the following particulars: *First*. In sustaining defendant's motion for a nonsuit, after plaintiffs had withdrawn their action. *Second*. In rendering judgment before the original notice was returned, and when he had no jurisdiction; it not appearing that said notice was ever served. They also urge that the court erred in permitting the justice to certify the amount of the costs made before him.

This judgment must be affirmed. It could make no possible difference, so far as plaintiffs' rights were concerned, whether the justice rendered judgment, as in case of nonsuit, when they voluntarily withdrew their action; or whether it was rendered on the defendant's motion. The consequences would be the same to them, in either event. So far as relates to the question of jurisdiction, and rendering judgment before the notice was returned, it is sufficient to say, that if the defendant voluntarily appeared, (as he did in this case,) it is immaterial whether any notice was ever issued, much less whether the one issued, was ever served. When the plaintiffs filed their petition, and the notice was issued, the magistrate had jurisdiction, as far as they were concerned, and though the defendant was not served, yet if he voluntarily appeared, the notice, so far as related to the

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jurisdiction of the court over the persons of both parties, was an unimportant and immaterial paper.

But it is said that plaintiffs were required to pay more costs than were taxed on the justices' docket, at the time they dismissed their suit. This is true, and in this we think there was no error. They were bound for all the costs legally made in the case, and not alone for those that might at that time be taxed on the justices' docket. They could not, by dismissing their suit, and paying costs before the return of the writs and process in the hands of the officer, avoid the payment of those costs made thereon. The District Court acted entirely within the sphere of its duty, in requiring the justice to certify the amount of costs made before him.

Judgment affirmed.

FAIRBROTHER v. SHAW *et al.*

In order to enforce the performance of a parol contract for the sale and conveyance of real estate, the existence of the contract and its terms, must be shown, and that the vendee, either paid a part of the purchase money, or took possession of the land, under the contract.

Appeal from the Jackson District Court.

THIS was a bill to enforce the fulfillment of an alleged contract for the sale and conveyance of a parcel of land. The contract is not alleged to be in writing, but the complainant avers, that John Shaw, in his lifetime, contracted to sell the said parcel for the sum of fifty dollars; that he paid deceased in his life, a part of the price, to wit: \$23.25; that he has ever been ready to pay the balance, and brings it into court; and that he took possession of the land by virtue of the contract, and with the consent of the said Shaw. The answer is sworn to, being called for under oath, and it denies the existence of such contract.

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Smith, McKinlay & Poor, for the appellants.

J. W. Jenkins, for the appellee.

WOODWARD, J.—It is not claimed that the contract was in writing. Then the complainant must show the existence of the contract, and also, either that he paid a part of the purchase money, or that he took possession under the contract. There is some testimony showing the existence of an agreement relating to some land, but it is doubtful whether it clearly applies to the parcel here claimed; and admitting that it applies to this land, yet, there is nothing showing the terms of the agreement. But waiving this point, there is no testimony tending to show a payment on this contract. The administrator admits that the deceased had had lumber of the petitioner, at different times, amounting to about the sum claimed to have been paid, but she does not know, nor believe, that it had any relation to such purchase. This is all the testimony on this point. On the question whether the complainant took possession under the contract, we are compelled to say, that there is no evidence. We are clearly of the opinion, that the decree below should have been in favor of the respondents, and, therefore, the decree of the District Court is hereby reversed.

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105	347

A mortgagee of real estate, is a *purchaser*, within the meaning of the recording laws of this state.

Appeal from the Linn District Court.

THE plaintiffs claim title to a tract of land under a deed, dated November 11, 1856, and recorded January 9th, 1857. Defendant, Green, claims a lien on the same land under a

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mortgage from the grantor of plaintiffs, of date November 18th, 1856, which was recorded January 5th, 1857. The defendants were proceeding to foreclose said mortgage by notice and sale under the Code, when plaintiffs instituted this proceeding to enjoin said sale, claiming that said mortgage was merely a cloud upon their title, and not a substantial lien as against them upon said land; but that if it was, that they might be permitted to redeem the same. The court below held, that said mortgage was not a lien upon said premises, but void as against the rights of said plaintiffs, and thereupon ordered a perpetual injunction as prayed. Defendants appeal.

Isbell, Hubbard & Stephens, for the appellants.

Is a mortgagee a purchaser, within the meaning of the registry law of Iowa? See definition mortgage, 1 Hilliard on Mort. 2; 2 Bouv. Law Dic. 403; Littleton, def. Purchase, § 12. The mortgagee has a distinct and independent beneficial interest in the estate. *Cholmondely v. Clinton*, cited in 1 Hill on Mort. 105; 2 Story's Eq. Jur. 278; *Seton v. Starle*, 7 Vesey, 283. A mortgage is a conveyance of property, and passes it conditionally to the mortgagee. *United States v. Fisher*, 2 Curtis, 358; *United States v. Hooe*, 3 Ib. 73; 1 Peters, 647. It is something more than a lien for a debt. It is a transfer of the property itself, as security for the debt. It is not a mere lien, but a trust estate. *Conrad v. Atlantic Ins. Co.*, 1 Peters, 647. The appellee lays stress on our statute, which leaves the legal title in the mortgagor. This has been the well settled law of this country and England, since the days of Lord Mansfield. 1 Hill. on Mort. 105, and cases there cited. Land is acquired only by descent or purchase. 4 Kent Com. 424; Bouv. Dic. 408. If a mortgagee has any interest in the land, he has it by purchase. The term purchaser embraces every mortgagee and his assignee. 4 Kent Com. 168; *Dickerson v. Tillinghast*, 4 Paige, 215; 19 Johns. 283.

Wm. G. Thompson, for the appellees, relied upon the fol-

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lowing authorities : Code, §§ 458, 1210 and 1211 ; 4 Cowen, 599 ; 13 Johns. 471 ; 4 Ib. 222 ; 2 Binney, 502 ; 15 Johns. 262 ; 1 Hill on Mort. 128.

WRIGHT, C. J.—But one question is presented for our determination by counsel, and that is, whether a mortgagee is a *purchaser*, within the meaning of the recording laws of this state. Of this, we entertain no doubt, being clearly of the opinion that the law designed to include a mortgage, as fully and entirely as the grantee or purchaser in an absolute and unconditional conveyance. The language of the Code, (§ 1211,) is, that “no instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration without notice, unless recorded in the office of the recorder of deeds of the county in which the land lies as hereinafter provided.” And then by section 1214, it is provided that the recorder must indorse upon every instrument properly filed, the time of such filing, and make the proper entries in the “entry book,” from which time “such entries shall furnish constructive notice to all the world, of the rights of the grantee conferred by such instrument.”

The argument of appellees is, that their deed as between the parties, was valid ; that they were only required to file it for record to protect themselves against a subsequent purchaser without notice, for a valuable consideration ; that the defendants are *mortgagees*, but not *purchasers* ; and that they therefore took nothing by said mortgage, though it may have been recorded prior to the deed of said plaintiffs. On the other hand, the argument of appellants is, that while said deed was valid as between the parties thereto, yet it was of no validity against a subsequent purchaser ; that the defendants are subsequent purchasers for a valuable consideration, without notice ; and that they had their instrument affecting said real estate, filed for record, before the deed of plaintiffs was so filed, and thus they acquired a priority of title or lien. At common law, a mortgage must be by deed, and the term originally signified that the estate thus conveyed, became *dead* to the mortgagor, unless the condition

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was performed at the time appointed. We also learn from the books, that it was a feoffment upon condition, or the creation of a base or determinable fee, with a right of *revertu* attached to it. *Hebron v. Centre*, 11 N. H. 571; 1 Hilliard on Mortgages, 8. Again, it has been said, that a mortgage is the conveyance of an estate by way of pledge, for the security of a debt, and to become void on the payment of it. 4 Kent, 133. Another definition given is, that it is a conveyance of lands by a debtor to his creditor, as a pledge and security for the repayment of money borrowed, or the performance of a covenant, with a proviso that such conveyance shall be void on payment of the money and interest, on a certain day, or the performance of such covenant by the time appointed, by which the conveyance of the land becomes absolute at law, yet the mortgagor has an equity of redemption, that is, a right in equity, on the performance of the agreement within a reasonable time, to call for a reconveyance of the land. Cruise Dig. L. 15, § 11; 1 Watts, 140; 1 Hill on R. P. 371.

So in 1 Pow. on Mort. 4, 7, we are told, that it is an absolute pledge, to become an absolute interest, if not redeemed at a certain time. The title of the mortgagee is said to be, not a mere *lien* depending on possession, but a real interest, though conditional. *Barnard v. Eaton*, 2 Cranch, 304. So in the case of the *U. S. v. Fertur*, 2 Cranch, 358, "a mortgage is a conveyance of property, and passes it conditionally to the mortgagee." And finally, in the language of STORY, J., in *Conrad v. Atlantic Ins. Co.*, 1 Pet. 441, a mortgage is not only a lien for a debt, but it is something more, it is a *transfer* of the property itself as security for the debt.

This must be admitted to be true at law, and it is equally true in equity, for in this respect equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is, therefore, only

in a loose and general sense, that it is sometimes called a lien, and then, only by way of contrast to an estate absolute and indefeasible. And it is doubtless in this general sense, that in *Hall v. Savill*, 3 G. Greene, 37, a mortgage is spoken of as a pledge or charge upon the land; and that the legal rights and remedies of others may be asserted to the property, subject to the *lien* of the mortgage. We have no difficulty from these authorities, in concluding that while the mortgage does *create* a lien upon the property mortgaged, yet that it also operates to transfer to the mortgagee a qualified or conditional estate, which becomes void on the payment of the debt, or the performance of the covenant. Again; if the mortgagee is not a purchaser, and if the interest acquired by him in the land, is not acquired by *purchase*, how is it acquired or held? Except a man hath his title or interest in lands by descent, he must have it by purchase. These are the only methods by which an interest in real estate can be lawfully acquired. Hence, to *purchase*, in the enlarged and technical sense, is defined to be the lawful acquisition of real estate by any means whatever, except descent. Bouvier L. Dict. tit. Purchase. And in the same section, quoting from Littleton, "purchase is called the possession of lands or tenements that a man hath by his own deed or agreements, into which possession he cometh, not by title of descent from any of his ancestors or cousins, but by his own deed." It is in this sense that we suppose the legislature used the term purchaser, and we cannot believe that it was only designed to include those only who, by their deeds, acquired at once, an absolute and indisposible estate in the land.

But it is argued that under the Code, the mortgagor retains the legal title, and that there is, therefore, an inconsistency in saying that the mortgagee is a purchaser. It is true that in the absence of stipulations to the contrary, he does retain such title, and the right to the possession of the estate. Code, § 1210. We are not aware that this section places the mortgagor, so far as the question now before us is concerned, in any different position, or gives

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him any greater right, than he would have had, and did have; independent of the Code. In *Hall v. Savill*, *supra*, it is said that the mortgagor of land has generally been considered the owner, subject only to the lien of the mortgagee. The rights and interest of the mortgagor, it is said, do not pass to the mortgagee, until he acquires possession—citing *Walton v. Crosby*, 14 Wend. 63. And such we understand to have been the general settled rule, without reference to statutory regulations. *Perkins v. Dibble*, 10 Ohio, 488; *White v. Whitney*, 3 Metc. 84; *King v. St. Michaels*, 1 Doug. 682; *Ewen v. Hobbs*, 5 Metc. 3. In this last case, SHAW, C. J., gives in a brief compass, what we regard as a correct statement of the relation which exists between the mortgagor and mortgagee: "The first great object of a mortgage," says he, "is in the form of a conveyance in fee, to give to the mortgagee an effectual security, by the pledge or hypothecation of real estate, for the payment of a debt, or the performance of some other obligation. The next is, to leave to the mortgagor, and to purchasers, creditors and all others claiming direct through him, the full and entire control, disposition and ownership of the estate, subject only to the first purpose, that of securing the mortgagee. Hence it is, that as between the mortgagor and mortgagee, the mortgage is to be regarded as a conveyance in fee, because that construction best secures him in his remedy, and his ultimate right to the estate, and to its incidents, the rents and profits. But in all other respects, until foreclosure, when the mortgagee becomes the absolute owner, the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached, and in other respects dealt with, as the estate of the mortgagor. And all the statutes upon the subject, are to be so construed, and all rules of law, whether administered in law or equity, are to be so applied, as to carry these objects into effect."

Under our law, while the mortgage has the *form* of a conveyance in fee, yet it is not strictly true, as between the parties, that it is to be *treated* as such, for the technical legal title remains with the mortgagor. This legal title, and all

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his interest, however, may be divested by foreclosure, and this without any other or further act or conveyance on the part of the mortgagor. While he retains the legal title, therefore, it is still true that the mortgagee is not thereby deprived of any remedy to which he would otherwise be entitled under his mortgage—nor to be defeated in his ultimate right to enforce the collection of his debt, by a sale of the mortgaged premises. Once more: if mortgages are not included in the provisions of the Code, regulating the recording of instruments affecting real estate, then they are in this respect left entirely unprovided for by our law. That is to say, if mortgages are not to be acknowledged and recorded in the same manner, and subject to the same rules, as other deeds of conveyance, then there is no statutory provision regulating the manner of their execution, nor the effect of the failure to record the same, upon the rights of those who may, either prior or subsequent to the execution of such mortgage, become interested in the property. We cannot believe that in a matter of so great and general importance, and involving so many interests, the law making power have been silent.

Judgment reversed.

COMPTON v. COMER.

Where a bill in chancery charges material facts to be within the knowledge, and certain acts to have been done at the instigation, of the respondent, and the answer does not respond to such charges, such charges are to be taken as true.

A respondent in chancery cannot pray anything in his answer, except to be dismissed the court.

If he has any relief to pray, or discovery to seek, he must do so by a bill of his own, or he may make his answer a cross bill.

Appeal from the Muscatine District Court.

THE petition in this case alleges, that the complainant in
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August, 1851, gave a mortgage to one Gatton, on 160 acres of land in Muscatine county, to secure the payment of a promissory note for \$150, due in fifteen months; that the complainant resided at the time in Illinois; that Gatton transferred the note to one Campbell, and Campbell to Fletcher, and that when complainant came to Iowa to pay the note, Gatton told him he had no further interest in it, but could not tell him where the note was, and he returned to Illinois, without paying it; that he heard nothing more of it, until in the year 1853, he learned that the respondent, Jno. Comer, was in possession of the land, and was claiming to be owner of the same, by virtue of a purchase at sheriff's sale, under a decree of foreclosure against complainant in the District Court of Muscatine county, in a suit brought in the name of Gatton, for the use of said Campbell. The petitioner avers that he was never notified according to law, of the pendency of any suit of foreclosure against him on said note and mortgage; and that the proceedings and the sale, if any was made, under the same, were void for want of such notice. He prays that the same may be declared void by decree of the court; and that not knowing who is the holder or owner of said note and mortgage, nor to whom to pay the same, that he may be permitted to pay the amount of the same into court, for the use of the person who may be entitled thereto. The petitioner makes Gatton, Comer, Campbell and Fletcher parties to the suit. He prays for discovery and general relief, and for an injunction against Comer, who is in possession, restraining him from cutting or destroying the timber on the land, which he avers, constitutes its chief value.

There is no appearance or answer by Gatton. Comer answers, and disclaims holding title to the land by virtue of the purchase at sheriff's sale, and claims to hold the same under an alleged parol agreement between complainant and himself, by which he avers complainant agreed to sell him the land for \$250. He avers that, after the suit was commenced on the note and mortgage, the complainant proposed to respondent, to purchase the land at the price aforesaid;

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that out of the amount, respondent might pay the mortgage on the land, and for the balance, have time of payment, and if respondent accepted the proposition, he was to notify complainant in Illinois. He alleges that he afterwards accepted the complainant's proposition, and wrote to him to that effect; that he purchased the note and mortgage of Fletcher, but not hearing from complainant, in answer to his letter, and not knowing any reason for his silence, he suffered the suit of foreclosure, already commenced, to proceed to judgment, and purchased the lands at sheriff's sale on the judgment, in order to compel complainant, to fulfill his agreement of sale with respondent. He admits that he bid off the land at the sale, for more than the amount of the judgment; that he directed the sheriff to hold the execution in his hands, until he should be able to see complainant; and that the sheriff went to California, and the execution has never been returned.

Fletcher, in his answer, states that he received the note on complainant from Campbell, in part payment for land sold Campbell, and was to credit Campbell with the amount received by him on the note; that he never saw the mortgage; and that he left the note for collection with an attorney in Muscatine; that before judgment was obtained, Comer came to him and wished to purchase the note; that he told him he did not know that he had any right to sell it, but finally received from Comer the amount of the note and interest, and transferred it to him. Campbell's answer states that he received the note and mortgage from Gatton, and transferred it to Fletcher, without assignment, as collateral security; that Fletcher was to credit him with the amount received on the note from Compton; that he did not part with his interest in the note, and did not direct suit to be brought against Compton, until he could be written to and heard from; and that he never authorized or directed a sale of the land on the judgment against Compton, and did not hear of it until some time after it took place.

The District Court, on the hearing, rendered a decree in favor of complainant, setting aside the proceedings in fore-

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closure, and the sheriff's sale under execution; directing that complainant should pay into court, for the use of the party entitled thereto, the amount of principal and interest due on the mortgage; and perpetuating the injunction granted against Comer. From this decree, Comer appeals.

Cloud & O'Connor, for the appellant.

Richman & Bro., for the appellee.

STOCKTON, J.—The complainant seeks relief in equity, against certain proceedings had in the District Court of Muscatine county, to foreclose a mortgage given by him on certain lands in said county, and for a decree that shall allow him to come in and pay off and discharge the mortgage. He also seeks such a discovery from the respondents, as shall inform him of the true state of facts, in respect to the sale of said lands, made by the sheriff under the decree rendered in said suit. The reasons alleged by the complainant, why the proceedings in said foreclosure suit should be set aside, and the sheriff's sale held for naught, are, that at the time of the commencement of the suit, he was a resident of the state of Illinois; that there was no such notice given of the pendency of the suit, as is required by law; that the suit was commenced on the 13th of May, by delivering the original notice to the sheriff; that the same was by him on the next day, "returned not found;" that the term of the District Court, at which the decree of foreclosure was rendered, commenced on the 7th of June thereafter; and that the four weeks' notice by publication, required by law, could not have been given between the said 14th of May, and 7th of June succeeding; that no return has been made by the sheriff of the execution, on which the lands were sold, and no deed for the same from the sheriff to the purchaser is on record; that the complainant only knows from rumor, that such sale has ever been made, and is informed and believes that one of the pieces of land, the same having been sold in parcels, brought, at the sheriff's

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sale, a greater amount than was necessary to pay the judgment and costs, notwithstanding which fact, all the land was sold, and no part of the purchase money has been paid, nor any surplus accounted for to complainant. These things, he alleges, were all done with the knowledge of respondent Comer, who is in possession of the land, and claims to own the same by virtue of the proceedings aforesaid, and who is alleged to have been the contriver of all the unfair practices charged, and who, though required, refuses to give to complainant any information or satisfaction in the premises.

The respondent Comer, while he, by his answer, claims the legal and equitable title in the land, makes no answer to the material allegations of the complainant's bill. The facts as to the means by which the decree was procured, and land sold, being charged to have been within the knowledge of Comer, and to have been done at his instigation, not being replied to by him, are to be taken as true; and we have only to inquire, whether the new matters set up by Comer, in his answer, by way of defence, are sufficient to defeat complainant's right to the relief prayed for. In this answer, without making it a cross bill, or seeking any discovery from complainant, in reply to its averments, Comer prays that the court, on final hearing, will decree the lands to him. And that complainant be required to convey the lands to him by good and sufficient deed.

The respondent cannot pray anything in his answer, except to be dismissed the court. If he has any relief to pray, or discovery to seek, he must do so by a bill of his own, or he may make his answer a cross bill. *Morgan v. Tipton*, 8 McLean, 389; *McConnell v. Hodson*, 2 Gilman, 640; Daniell's Chancery Practice, chapter 81. The matters set up by the answer, are not presented in such shape as to be available to respondent, either as a bar to the relief sought by complainant, or as ground on which the court can base any decree in favor of respondent.

Waiving, however, for the present, all questions as to the form in which the matter of the answer is presented, we in-

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quire as to its sufficiency, in point of substance, to defeat complainant's claim to relief. It is evident that Comer cannot claim the land by virtue of the parol agreement with Compton, and by virtue of the purchase at sheriff's sale, at the same time. They cannot both stand, and one or the other he is compelled to abandon. He has chosen to abandon his claim of title under the purchase at sheriff's sale, and to rely on the alleged parol agreement with Compton. How, then, does the case stand, viewing it in the light in which it is sought to be placed by respondent, as a purchase of the land by him from complainant? We are of opinion, that the evidence is not sufficient to show a proposition on the part of complainant to sell the land, accepted by Comer, and notice of such acceptance given to complainant. It was not sufficient to show that respondent addressed a letter to complainant, through the post office at Middleton, Illinois, accepting the proposition, without evidence that complainant received the letter. Nor can the purchase of the mortgage by respondent, be regarded in the light of a payment by him to Compton, upon the land. The respondent did not so regard it himself. He prosecuted the suit on the mortgage, commenced by Fletcher, to judgment against Compton, issued execution on the judgment, and bought in the land at the sheriff's sale. There is a wide difference between payment, which would have satisfied and extinguished the mortgage, and the purchase of it by respondent, and his attempt to enforce it as a valid and subsisting demand against complainant, by prosecuting the suit to judgment, and selling the land to satisfy it. As respondent abandons all claim to the land under the sheriff's sale, it is no answer to the objection, to aver that he sold the land under the judgment of foreclosure, in order that he might keep it in such a position as to compel Compton to fulfill his verbal contract with him. Nor can respondent's possession of the land in any respect strengthen his claim. Such possession, to be of any avail, must have been with the actual or implied consent of Compton, and under and by

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virtue of the contract of sale. But if no contract or agreement is shown, neither payment by respondent, nor possession of the land, is of any avail.

Decree affirmed.

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It is not a sufficient reason for setting aside the verdict of a jury, and ordering a new trial, that a portion or all of the jurors, supposed that their verdict, if for the defendant, would not be a bar to a subsequent suit by the plaintiff, for the same cause of action.

Where, in an action against husband and wife, on a promissory note, made by the wife as executrix, the execution of which note was denied under oath, the jury returned a verdict for the defendants; and where the plaintiff moved the court for a new trial, on the ground of a mistake of the jury as to the law and facts of the case, and a wrong impression as to the rights of the parties, which motion was accompanied by the affidavits of two of the jurors—one of whom states, that in making up the verdict, he was under the impression, that if the jury found for the defendants, it would not prevent the plaintiff from bringing another suit, and recovering of the defendants; that he was satisfied that defendants owed plaintiff the money; and that, except under the impression stated, he would not have consented to a verdict against the plaintiff; and the other states, that he was satisfied that the wife had borrowed the money claimed by plaintiff, and had directed the note sued on, to be signed and executed for her; that in agreeing to a verdict for defendants, he supposed that such verdict would not be a bar to a future suit and recovery by the plaintiff against defendants; that the greater part of the jury were of opinion, that the verdict for defendants would be no bar; and that he is not now satisfied with the verdict, and would not again consent to a verdict for defendants; and where the plaintiff also moved the court to allow him time to procure the affidavits of the jurors who tried the cause, in order to show that the jury was mistaken in the law, as to the conclusiveness of their verdict, in case they found for defendant, which motion was supported by the affidavit of the plaintiff's attorney, in which he states that he had conversed with two of the jurors, since the rendition of the verdict, and whose affidavits had been procured and filed; that he believed there was sufficient ground to authorize the granting of a new trial, if time was allowed to procure the affidavits of the remaining jurors; and that the plaintiff would be able to show that the jury were mistaken in the law applicable to the case, both of which motions were overruled by the court; *Held*, That the motions were properly overruled.

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Appeal from the Jefferson District Court.

SUIT on promissory note, purporting to have been made by defendant Rossana, as executrix of Hugh DeFrance, deceased. The defendants by their answer, under oath, denied the execution of the note, and denied any indebtedness to plaintiff. A trial being had on this issue, the jury returned a verdict for the defendants. The plaintiff moved the court for a new trial, the grounds for which were an alleged mistake of the jury, as to the law and facts of the case, and a wrong impression as to the rights of the parties. Accompanying the motion, plaintiff filed the affidavits of two of the jurors who tried the cause. One of them states that in making up their verdict, he was under the impression, that "if the jury found for the defendant, it would not prevent the plaintiff from bringing another suit, and recovering of the defendants;" that he was satisfied that defendant owed plaintiff the money; and that except under the impression stated above, he would not have consented to a verdict against the plaintiff. Another juror states, that he was satisfied that the defendant Rossana had borrowed the money claimed by plaintiff, and had directed the note sued on to be signed and executed for her; that in agreeing to a verdict for defendants, he supposed that such verdict would be no bar to a future suit and recovery by plaintiff against defendants; that the greater part of the jury were of opinion, that the verdict for defendant would be no bar; and that he is not now satisfied with the verdict, and would not again consent to a verdict for defendant. The plaintiff also moved the court to allow him time to procure the affidavits of the jurors who tried the cause, in order to show that the jury were mistaken in the law, as to the conclusiveness of their verdict, in case they found for defendant. The affidavit of the plaintiff's attorney was filed, which went to show that he had conversed with two of the jury, since the rendition of the verdict, and whose affidavits had been procured and filed, and that he believed that there was sufficient ground to autho-

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rize the granting of a new trial, if time was allowed by the court, to procure the affidavits of the remaining jurors, and that plaintiff would be able to show that the jury were mistaken in the law applicable to the case; and that since the trial of the cause, and up to the time of the adjournment of the court, about to take place, there had been no opportunity to converse with the remaining jurors, because they had immediately been called into the jury box to try another cause. The court overruled the motion of the plaintiff, for time to be allowed him to procure the affidavits of the remaining jurors, and overruled the motion for a new trial. Plaintiff files a bill of exception and appeals.

C. Negus, for the appellant.

Slagle & Acheson, for the appellees.

STOCKTON, J.—The appellant insists that the District Court erred in overruling the motion for a new trial. It is not claimed that the verdict of the jury asked to be set aside, was contrary to the evidence or to the instruction of the court. No exception was taken to the ruling of the court. And the evidence on which the verdict was founded, has not been embodied in the record. We are, therefore, unable to say that it was other than such as the charge of the court, and the testimony in the cause, required the jury to render. It is not a sufficient reason for setting aside the verdict of a jury, and ordering a new trial, that a portion or all of the jury supposed that their verdict, (if as in this case for the defendant), would not be a bar to a subsequent suit by the plaintiff, for the same cause of action. If the jury have responded correctly to the issues they were sworn to try, according to the charge of the court, and the verdict conforms to law, and the testimony in the cause, their verdict should not be set aside for the reason urged by plaintiff. It is not sufficient that one, or all of the jury should have been of opinion that the defendants owed the plaintiff the one hundred dollars sued for, and that they agreed to their verdict on the supposition and belief, that the plaintiff

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might recover in another action. In order to be available as a sufficient reason for setting aside the verdict, it must appear to this court that the verdict actually rendered was against the evidence, and this must be shown affirmatively by embodying all the evidence in the record. The fact that the jury, or a portion of them, thought that defendants owed the plaintiff the one hundred dollars sued for, is not conclusive of the fact that they thought he was entitled to recover in the action. And even the fact that they found a verdict against their own conviction, must derive all its weight from the determination of the question, whether the verdict was contrary to the law and the evidence. That it was contrary to the instructions of the court, is not claimed. A verdict may be against strict law, and against the weight of evidence, and still be in accordance with substantial justice. As we are not enabled to say that the verdict was against the weight of evidence, or subversive of substantial justice, we must take it for granted that the District Court, correctly overruled the motion for a new trial.

It is further assigned for error by plaintiff, that the District Court refused to give him time to procure the affidavits of the remaining ten jurors, in order to show to the court, that the verdict was rendered by them under a mistaken apprehension, that their verdict for the defendant would not bar the plaintiff from recovering the amount of money claimed of defendants in another suit. It is not our purpose to inquire whether the apprehension of the jurors was a mistaken one or not. That is not a question for us now to decide. Nor do we see that the case would, in any respect, have been altered or made stronger for the plaintiffs, if all the jury had made oath to facts of the same tenor and effect as those stated in the affidavits of the two jurors produced and filed. The question to be determined was, whether the verdict was according to the law and evidence, and whether it rendered substantial justice to the parties. The District Court on these questions saw fit to decide in favor of the defendant, and to overrule the motion of plaintiff. As

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we are not in possession of the facts proved, we have no means of reversing the discretion exercised by the District Court. The judgment will, therefore, be affirmed.

Judgment affirmed.

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If a party desires to have the appellate court review the decision of the District Court, in sustaining or overruling a demurrer, he must suffer judgment in chief to be rendered in that court, on the demurrer.

Taking a bill of exceptions, will not raise any question for the adjudication of the appellate court, if the demurrer has been waived by pleading over.

Where a commission to take a deposition, was directed to the "clerk of the District Court of Morgan county, Indiana," and the deposition was taken and certified by the "clerk of the Court of Common Pleas of Morgan county, Indiana;" *Held*, That the deposition should have been suppressed.

Where a commission to take depositions, is issued by the clerk, under the seal of the court, it will be presumed to have issued by the authority of the court.

Where the caption of a deposition stated, that the deposition was taken "at the clerk's office of the Court of Common Pleas of said county," before said clerk, (naming him) "at Martinsville, in said county and state, on Thursday, the 22d day of March, 1855, between the hours of nine o'clock, A. M., and four o'clock, P. M. of said day, pursuant to the commission hereto attached," &c.; and the clerk certified, "that the said deposition was taken at my office in Martinsville, in said county and state, on Thursday, the 22d day of March, 1855, between the hours of nine o'clock, A. M., and four o'clock, P. M.;" "that said deponent was by me duly sworn according to law; and that the foregoing deposition was written by me, and signed by said deponent in my presence;" *Held*, That taking the certificate, in connection with the caption, it sufficiently appeared, that the deposition was subscribed and sworn to by the deponent, at the time and place therein mentioned.

Where a party contracts, or is liable to pay "in good property," an action cannot to be sustained against him, until after a demand of property in payment. Allegations in a pleading, not responded to, must be taken as true.

Appeal from the Jasper District Court.

THE plaintiff, as the husband of Eliza B. Plummer, claims of defendant the sum of \$270, principal and interest, and for cause of such claim, states that the defendant, in pursuance of

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ten / the will of Zur Combs, deceased, undertook and promised to pay the plaintiff one hundred and forty dollars, as set forth in said will; and that the claim has been on interest for fifteen years, and remains unpaid. Defendant appeared to the suit, and answered, denying any indebtedness or promise to pay, as alleged in the petition. There is also a plea of payment, and of the statute of limitations. Plaintiff replied, alleging that defendant had not been a resident of the state of Iowa, at any time within ~~ten~~ years before the commencement of the suit, and taking issue on the plea of payment.

The evidence consisted of a certified copy of the will of Zur Combs, and the deposition of Jacob H. Combs. The caption to the deposition read as follows: "The deposition of Jacob H. Combs, of Morgan county, Indiana, taken at the clerk's office of the Court of Common Pleas of said county, before Oliver R. Dougherty, said clerk, at Martinsville, in said county and state, on Thursday, the 22d day of March, 1855, between the hours of nine o'clock, A. M., and four o'clock, P. M., of said day, pursuant to the commission and notice hereto attached, and herewith returned. * * * * "Said deponent being of lawful age, and first duly sworn according to law by said clerk, deposes and says;" and the certificate was in the following form: "I, Oliver R. Dougherty, clerk of the Court of Common Pleas of Morgan county, in the state of Indiana, do hereby certify that said deponent, Jacob H. Combs, was by me duly sworn according to law; that the foregoing deposition was written by me, and signed by the said Combs in my presence; that neither party attended in person or by attorney; and that said deposition was taken at my office in Martinsville, in said county and state, on Thursday, the 22d day of March, 1855, between the hours of nine o'clock, A. M., and four o'clock, P. M.," and properly signed by the officer. A motion was made by the defendant to suppress this deposition, for reasons which will be found in the opinion of the court, which motion was overruled by the court. The jury returned a verdict for the plaintiff; and a motion for a new trial, on the

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ground that the verdict was contrary to the law and evidence, was overruled by the court. The defendant appeals. Other facts necessary to an understanding of the case, will be found in the opinion of the court.

Samuel A. Rice, for the appellant.

No appearance for the appellee.

STOCKTON, J.—I. The demurrer was waived by the subsequent answer of defendant. If a party desires to have this court review the decision of the District Court, in sustaining or overruling a demurrer, he must suffer judgment in chief to be rendered in that court on the demurrer. Taking a bill of exceptions will not raise any question for the adjudication of this court, if the demurrer has been waived by pleading over.

II. The third assignment of errors is upon the refusal of the District Court to suppress the deposition of Jacob H. Combs, taken on the part of the plaintiff. The reasons urged in favor of the motion to suppress the deposition are :

1. That the commission is directed to the "clerk of the District Court of Morgan county, Indiana,"—and the deposition is taken and certified by and before the "clerk of the Court of Common Pleas" of Morgan county, Indiana.

2. That said Combs, the witness, is a party to the will referred to in petition, and is consequently an interested witness.

3. That the commission is not issued in the name of the District Court of Jasper county.

4. That an exhibit is referred to by the witness in the deposition, which is not appended to the deposition, nor any copy of the same, and no reason is shown for such failure.

5. That the certificate of the clerk is insufficient in this, that it does not show that the deposition was subscribed and sworn to by the witness, at the time and place therein mentioned.

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6. That part of the testimony of the witness is given from hearsay only.

The first objection to the admissibility of the deposition is, we think, well taken. If it were made to appear in any sufficient manner, that there was no "district court" in Morgan county, Indiana, and that the "Court of Common Pleas," was a court of the same character and jurisdiction; we think the fact that the deposition was taken by the clerk of the "Court of Common Pleas," and not by the clerk of the "District Court," would furnish no sufficient reason for suppressing the deposition. In this case, however, there is nothing in the record, from which we are authorized to infer that there was not in Morgan county, a district court, with a clerk, which clerk alone, in such case, was the proper person to have taken the deposition.

III. Some of the remaining objections are relied upon as sufficient, and some are not. We are of opinion, they are not well taken. The direction of the statute, (§ 2455,) that the commission issue in the name of the District Court, is sufficiently answered, if it is shown that the commission is issued by the clerk under the seal of the court. It will be presumed to have issued by authority of the court, which, for all practical purposes, is the same as if it had formally issued in its name. The certificate of the clerk is not as full and specific as it might have been made—but taking the whole of it together, and in connection with the caption, we think it sufficiently shows that the deposition was subscribed and sworn to by the witness, at the time and place therein mentioned. We have thought it advisable to notice thus particularly, the questions arising on the third assignment of errors, as the same may arise again in the District Court, if any further proceedings are had in the cause.

IV. The fourth assignment of errors is upon the refusal of the court to arrest the judgment, and order a new trial on defendant's motion. The evidence before the District Court is all set forth by the bill of exceptions. It consists of a certified copy of what purports to be the will of Zur Combs, of Highland county, Ohio, and the deposition of

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Jacob H. Combs of Morgan county, Indiana. The will is made part of the plaintiff's petition, and is dated April 15, 1828. The testator devised to his daughter Barbara and Philip Roads, her husband, a farm in Ohio, on certain conditions, and charged with certain legacies, to be paid by the said Barbara and Philip, which are set forth at length in the will. Among others are the following :

"4. To my son Jacob W. Combs, I will and bequeath one hundred and fifty dollars, to be paid by Barbara Ann Roads and Philip Roads, her husband, in two years after they obtain clear and full possession of the farm I, by this will, bequeath to them ; the \$150 to be paid in property.

"5. To Eliza B. Plummer, I bequeath one hundred and forty dollars, to be paid in good property, as above, by said Barbara and Philip Roads, in two years after they get possession of said farm."

The "full and clear possession" spoken of in the will, was to take place on the death of Mary Combs, the wife of the testator, who it is shown by the deposition of Jacob H. Combs, had been dead some fifteen years before the suit was brought. The plaintiff avers in his petition that the defendant undertook and promised to pay to the plaintiff the one hundred and forty dollars mentioned in the will, in pursuance of, and as set forth in the said will. On this averment, issue is joined. It is shown by the testimony of Jacob H. Combs, before referred to, that the defendant had taken possession of the farm some twenty-eight years before, and the witness had often heard him say he owed the plaintiff, the one hundred and forty dollars, on account of the farm bequeathed to defendant. This, however, is all the testimony. There is no evidence that plaintiff had ever demanded of defendant the amount "to be paid in good property," according to the tenor of the will. Until such demand is shown, the plaintiff is not entitled to recover, and the verdict is not sustained by the evidence.

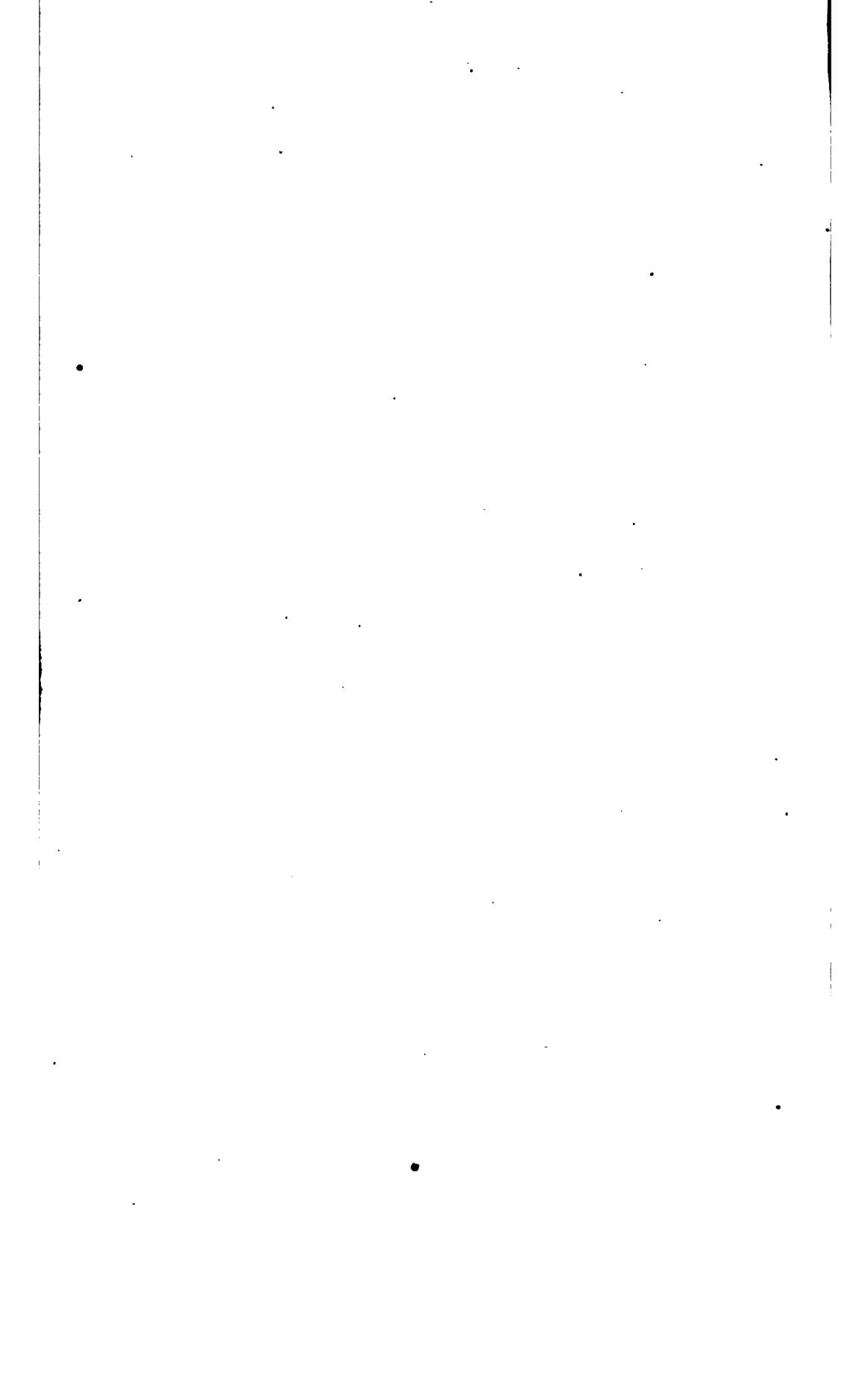
V. There was no issue joined on the plea of the statute of limitations. The affirmative allegation of plaintiff's replication, that defendant had not been a resident of the state of

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Iowa for ten years next preceding the commencement of the suit, was neither admitted nor denied by defendant. And the allegation not being responded to, must be taken as true. Code, § 1742. As the record sets forth all the evidence given before the District Court, and as we think it was insufficient to authorize a verdict for the plaintiff, the judgment will be reversed, and a new trial ordered.

Judgment reversed.





INDEX.

ABATEMENT.

1. Proceedings by the guardian to sell the real estate of the ward, under the act of January 25, 1839, did not abate by the resignation of the guardian. *Wade v. Carpenter et al.*, 361.

2. Where a guardian of the person and property of the minor, filed a petition in the county court, to sell the real estate of the ward, and before a hearing upon the petition, resigned; and where, upon the appointment of another guardian, the proceedings to sell the real estate were carried on without filing a new petition, or serving a new notice upon the ward, and a license to sell was granted to the new guardian, as successor of the one in whose name the proceedings were commenced; *Held*, That the proceeding for license to sell, did not abate, by reason of the resignation of the first guardian; and that the license was properly granted to the second guardian. *Id.*

3. A proceeding by a wife against the husband, under section 1485 of the Code, asking for a change or modification of a former decree, making an allowance for the support of the wife, abates by the death of the husband. (STOCKTON, J., *dissenting*.) *O'Hagan v. Ex. of O'Hagan*, 509.

4. Where a wife obtained a decree of divorce against the husband, in which the husband was required to pay her a certain sum, "in full as alimony;" and where the wife subsequently filed her bill, asking that the former decree, so far as it relates to alimony, might be changed, so as to give her a further monthly allowance for the support of herself and children, during the pendency of which bill the husband died; and where the executor of the husband was made a party respondent, and insisted that the proceeding abated on the death of the husband, and the court dismissed the bill of the complainant; *Held*, That the bill was properly dismissed. *Id.*

ACKNOWLEDGMENT.

1. Where the certificate of acknowledgment of a deed is defective, it cannot be shown by evidence *aliunde*, that everything required by statute was done in fact, and that the officer, through mistake, omitted to certify a part; nor can the certificate be amended upon such evidence. *O'Ferrall v. Simplot*, 381.

2. Under the act of January 4, 1840, entitled an act to regulate conveyances, it is essential to the validity of the acknowledgment of a deed by a *feme covert*, that the certificate of the officer taking it should show, that the contents of the deed were made known to the wife, and that she freely relinquished her right of dower in the premises. *Id.*

3. Section 1230 of the Code, and the statute of January 4, 1840, which provide that neither the certificate of acknowledgment of a conveyance, nor the record, nor transcript thereof, is conclusive evidence of the facts therein stated, were intended to provide for cases of fraud in obtaining the acknowledgment, or where the certificate is alleged to be false, and do not authorize an amendment of such a certificate, so as to supply defects therein. *Id.*

ACTION.

1. In actions *ex contractu*, as well as in those *ex delicto*, the plaintiff may enter a *nolle prosequi* as to a part of the defendants, when they sever in their pleas, and plead matter going to their personal discharge. *Quigley v. Merritt et al.*, 475.

2. So, when they simply sever in their pleas, without looking at the matter of the plea. *Ib.*

3. Where, in an action against several defendants, for money had and received for the use of the plaintiff, the defendants severed in their pleas, each pleading matter going to his separate discharge; and where, on the trial, after some testimony had been given to the jury, the plaintiff entered a *nolle prosequi* as to all the defendants, except one; and where the court, on motion of the remaining defendant, held that the *nolle prosequi* operated to dismiss the action as to the remaining defendant also, and the action was dismissed; *Held*, That the court erred in dismissing the action. *Ib.*

ADMINISTRATOR'S SALE.

1. Where, in an action of right, the defendant, to prove title in himself, offered in evidence the record of the proceedings in the Probate Court, on an application of an administrator, for a license to sell the real estate in controversy, for the payment of the debts of the intestate, under the statute of wills, approved February 13th, 1843, from which it appeared that the said court ordered the sale of said real estate, after giving public notice thereof, for three successive weeks, in a specified newspaper; and where it was agreed between the said parties, that the said notice of said sale was published in the newspaper specified by the Probate Court, on the 31st of July, and the 7th and 14th of August, 1846, and that the sale took place on the 15th of August, 1846; and where, in said action of right, it was objected that the publication of the notice of sale was insufficient, for the reason that it was not published three full weeks; *Held*, 1. That the publication was sufficient; 2. That the sufficiency of the notice of sale was a question for the adjudication of the Probate Court, and that if its decision was erroneous, an appeal was the proper method for correcting the error. *Morrow v. Weed*, 77.

AFFIDAVIT.

1. An affidavit for a continuance, on the ground of the absence of witnesses, which does not show that any effort has been made to procure their attendance, nor any excuse for the want of that diligence which the law requires, is insufficient. *Widner v. Hunt*, 355.

2. An affidavit for a continuance, on the ground of the inability of a witness to attend the court, should show that a knowledge of such inability on the part of the witness was not known to the party asking the continuance before the commencement of the term, and in time to have taken the testimony by deposition. *Ib.*

3. The practice of allowing affidavits for a continuance to be amended, or a new affidavit to be filed, when the first has not made out the case desired to be shown by the party, is one which the courts should permit with great caution, if permitted at all. *Ib.*

4. Where it appeared from affidavits in a cause that the cause was tried in the court below, on the last day of the term; that while the jury were in their room, deliberating on their verdict, the court sent them oral instructions by the bailiff; that after the jury returned a verdict for the plaintiff, the defendant moved the court to set aside the verdict and grant a new trial; and that while his counsel was arguing this motion, the judge adjourned the court *sine die*, refusing either to sustain or overrule the motion, and refusing to grant the

counsel time to prepare a bill of exceptions, the judgment of the District Court was reversed, and a new trial granted. *Campbell & Brothers v. Ayres*, 358.

5. The facts alleged in an affidavit or petition for an attachment, cannot be controverted, and an issue raised thereon in the principal suit. Such issues can be made only in an action on the attachment bond. *Sackett, Belcher & Co. v. Partridge & Cook*, 418.

6. Where a motion is made to dismiss an appeal in a criminal case, for insufficiency of the affidavit of appeal, the facts stated in the affidavit are to be taken as true. *Beckman v. The State*, 452.

7. If the State wishes to controvert the statements of the affidavit for an appeal, as to the testimony given on the trial before the justice, a rule should be obtained requiring the justice to certify to the District Court all the evidence on the trial before him. *Id.*

8. Where an affidavit for an appeal in a criminal case sets out the evidence against the defendant, and avers that the State has failed to prove any charge laid in the information; that the judgment of the justice was erroneous, and contrary to the evidence; and that injustice has been done the defendant, it is sufficient to entitle the defendant to an appeal, and to have the judgment of the justice reversed, or, at least, to a new trial in the District Court. *Id.*

9. Jurors cannot be compelled to make affidavits, showing that the jury disregarded and refused to take into consideration the instructions of the court. *Grady v. The State*, 461.

AGREEMENT.

1. Where in an action for work and labor performed, the defendant answered, admitting the number of days claimed, but denying that the work done was worth the sum of two dollars per day, and alleged that in March, 1856, the parties disagreeing as to the price, had a settlement, at which it was agreed that the defendant should pay the plaintiff \$1.37 1-2 per day, and that he should pay one-half of the sum so found due within two weeks from that time, and the other half in May then next following; and where the answer further alleged, that the defendant paid to the plaintiff twenty dollars, within one week, which the plaintiff received, and that in twelve days from the settlement, he tendered to the plaintiff twenty-six dollars, the balance of the half then due, which balance he pays into court; and where the plaintiff replied, denying the settlement and agreement, and the payment and the tender of the money, and also pleaded that the agreement was without consideration, to which the defendant rejoined that there was a good and valuable consideration for the agreement; and where the court instructed the jury, that if, before the plaintiff commenced his action for compensation, the parties met and agreed upon the amount due, and fixed the time when payment should be made, such an agreement is to be considered an account stated, and is valid in law: *Held*, 1. That the answer of the defendant was not a plea of accord and satisfaction, but a plea of an account stated as the amount to be paid, and then an agreement as to the time of payment. 2. That the agreement was not conditional in its character. *Cool v. Stone*, 219.

2. The principle that an agreement, without consideration, to accept a less sum than is due in discharge of the debt, cannot be pleaded as a bar to an action for the whole debt, does not apply to cases where the sum due is unliquidated. *Id.*

3. A voluntary agreement, without any valuable consideration, cannot be enforced against the heirs of the party making the agreement. *Holland et al. v. Hensley et al.*, 222.

4. If a contract, by which a trust is created, is complete and executed, it will not be disturbed for want of a consideration; but courts of equity will not

carry into effect a mere voluntary agreement, contract, or covenant, to transfer property. *Id.*

5. The want of a consideration, is universally a good defence to a bill for rectifying a voluntary conveyance, or enforcing a voluntary agreement. *Id.*

6. Previous to the year 1849, V. sold to B., a tract of land, on which to erect a mill, and to secure the sum of \$800, due on the land, executed a deed of trust to V., under which the land was subsequently sold, and purchased by V. On the 16th of July, 1849, B. being indebted to R., for money paid by R., for the purpose of building a mill and other improvements on the land, executed a note to R. for \$325, payable in one year, and secured the same by a mortgage on the land bought of V., and also agreed that B. should hold a lien on the land, for all money, goods, materials and labor, furnished or paid by him, towards the erection of the buildings or mill dam. On the 2d of May, 1850, V. executes to R. an instrument in writing, to the effect, that "V. agrees that R. shall hold a lien for all moneys, materials and labor, paid for by said R., for building a mill or other improvements on said land, and said R. agrees to furnish B., on their agreement, such things as their contract calls for, to build said mill, which writing was signed by V., but not by R. When the land was sold under the trust deed, is not shown. In November, 1850, R. assigned the note, and delivered the mortgage from B. to the plaintiffs, and also delivered to them the agreement of V. On a bill filed by the plaintiffs, against B. and V., praying a foreclosure and sale as to the land, which shall postpone to the claim and lien of the plaintiffs, any interest of V. in the premises; *Held*, 1. That the agreement of V. with R., dated May 2, 1850, was an undertaking on the part of V., to give to R., a lien on the land, for all money, labor, or materials advanced by R., for the purpose of building the mill and other improvements on the land, before as well as subsequent to the date of the agreement, and included the sum for which the note of B. was executed. 2. That the court erred in excluding the agreement of V. from the jury. 3. That the plaintiffs, by virtue of the assignment of the note and mortgage of B., acquired the right, under the agreement of V., dated May 2, 1850 to a decree against V. postponing any claim he might hold against B. and the land, to the claim and lien held by the plaintiffs. 4. That the agreement of V. to give R. a lien, imparted a quality to the debt of B. to R., which passed to the plaintiffs with the assignment of the note. *Crow, M'Creary & Co. v. Vance*, 434.

AMENDMENT.

1. An amendment of a petition, showing the character in which the plaintiff sues, but not changing the plaintiff, is permissible. *Hunt v. Collins*, 56.

2. After the filing of a plea in abatement, alleging that the plaintiff held the cause of action in a representative capacity, and not in his own right, and after a finding for the defendant on such plea in abatement, and before judgment is rendered on the finding, the plaintiff may amend his petition, so as to show the representative capacity in which he sues, upon such terms as the court may impose. *Id.*

3. It is within the discretion of the District Court, to refuse leave to amend an affidavit for a continuance, adjudged insufficient, or to file a new one, unless for the purpose of presenting facts which have transpired, or come to the knowledge of the party, since the filing of the first. *Widner v. Hunt*, 355.

4. Section 1230 of the Code, and the statute of Jan. 4, 1840, which provide that neither the certificate of acknowledgment of a conveyance, nor the record, nor transcript thereof, is conclusive evidence of the facts therein stated, were intended to provide for cases of fraud in obtaining the acknowledgment, or where the certificate is alleged to be false, and do not authorize an amendment of such a certificate, so as to supply defects therein. *O'Ferrall v. Simplot*, 381.

ANSWER.

1. A rule of the District Court, fixing the time within which a defendant must answer, is law; and a defendant is presumed to know when his answer should be filed. *Worster, Templen & Co. v. Oliver*, 345.

2. Where by a rule of the District Court, the time for answering is different from that fixed by the Code, it is not essential that the original notice should inform the defendant of the time when, by such rule, he is required to answer. *Ib.*

3. Where a plaintiff, in his original notice, requires a defendant to answer by a day different from that fixed by the rules of the court, the plaintiff should be held to the time fixed in his notice, and not be permitted to have judgment entered before that day. *Ib.*

4. Where by a rule of the District Court, parties defendant were required to plead, answer, or demur, on or before the morning of the *first* day of the term; and where an original notice notified the defendants to appear and answer, on or before the morning of the second day; and where, at the return term, a motion was made to quash the original notice, for the reason that the said notice does not inform the defendant of the time when, by the rules of the court, they are required to plead, which motion was sustained by the court, the notice set aside, and the cause continued for want of service; *Held*, That the court erred in quashing the original notice. *Ib.*

5. Where a party was sued as a common carrier, for so negligently and carelessly performing his contract to carry a demijohn, containing six gallons of brandy, from B. to O., that the same was lost and destroyed; and where the defendant, in his answer, denied the contract, and averred that it was void; that plaintiffs sent a letter, by his teamster, for some articles; that he did not know what they were; and that if the plaintiffs sent for brandy by his teamster, he is not liable; *Held*, 1. That the answer amounted only to the general issue; 2. That the answer set up no fact, making the contract void. *Bowen & King v. Hale*, 430.

6. Where an action of slander was commenced in October, 1852, and at the return term, the defendant answered, denying the speaking of the words; and where, on the 26th of March, 1855, the defendant filed a further answer, to which a demurrer was sustained, and the cause stood at issue, on the answer filed in 1852, until the 13th day of April, 1857, when the defendant filed what is termed "a further and additional answer," in which he claimed a certain sum of money for the value of four dozen chickens, and damages for slanderous words spoken by the plaintiff of the defendant, and also alleged, that the plaintiff's character was so bad, in the community in which he resided, that he sustained no injury from the speaking of the words by defendant, which answer, on motion of the plaintiff, was stricken from the files; *Held*, That under the circumstances of the case, there was no error in striking the answer from the files. *McClintock v. Crick*, 453.

7. Where a creditor's bill was filed in September, 1854, which did not require the respondents to answer under oath, and the answer to which was not sworn to; and where, after the cause had been pending two or three terms, and over a year, the respondents asked and obtained leave to file an amended answer, in the nature of a plea, and on the 16th of June, 1856, filed an answer, consisting of the entire former one, with an addition setting up other matter, which amended answer was sworn to; *Held*, That the answer could not be treated as a sworn answer. *De France v. Howard et al.*, 524.

8. Where an account against a county, was rejected by the county court, from which decision, an appeal was taken to the District Court; and where the said county filed an answer in the District Court, pleading a set-off, and a former adjudication; and where the plaintiff moved to strike the answer from the files, for the reason that no pleadings can be filed after appeal, which mo.

tion was overruled by the court; *Held*, That the court did not err in refusing to strike out the answer. *Ford v. Jefferson County*, 566.

9. A respondent in chancery cannot pray anything in his answer, except to be dismissed the court. *Compton v. Comer*, 577.

10. If he has any relief to pray, or discovery to seek, he must do so by a bill of his own, or he may make his answer a cross bill. *Id.*

APPEAL.

1. The common effect of an appeal, where a supersedeas bond is filed, is to suspend the effect or operation of the judgment appealed from. *Danforth, Davis & Co. v. Carter & May*, 230.

2. In criminal cases commenced before a justice of the peace, and appealed to the District Court, the affidavit for the appeal must be taken as the basis of the case in the District Court. *Garrettson v. The State*, 338.

3. If the facts alleged in the affidavit are not correctly stated, the prosecutor should cause the justice to certify the true state of the transaction. *Id.*

4. Where in a suit commenced before a justice of the peace, and appealed, one M. was garnished as a debtor of the defendant, and required to appear on the day set for the trial of the cause; and where, on the day set for trial, the defendant failed to appear, and judgment was rendered against him by default; and where, when the garnishee appeared, one J. H. "also appeared, and claimed the money in the hands of M. to be his, and to be admitted to defend the same;" and where the plaintiff demanded a jury, and the jury returned a verdict for the plaintiff; and where judgment was rendered against M., the garnishee, for the money in his hands belonging to the defendant, and against the defendant, for the costs of suit, from which the defendant appealed, which appeal was allowed; and where, from other entries on the docket of the justice, it appeared, that on the day the appeal bond was filed, the defendant filed with the court, a writing constituting J. W. H. his agent to prosecute the appeal or settle the same, as he might think fit; that on the same day, the plaintiff filed with the justice a writing, authorizing the justice to settle for her all matters in controversy between herself and defendant, by his paying the principal and interest of the debt, she agreeing to pay the costs; and that the agent of the defendant, being on the next day, informed of said proposition, accepted the same, and ordered the appeal not to be sent to the District Court; and where, on the filing of the papers in the District Court, the appeal, on motion of the plaintiff, was dismissed; *Held*, 1. That the judgment against the defendant for costs, in the proceedings against the garnishee, was a judgment that he had the right to appeal from; 2. That the entries made by the justice on his docket, subsequent to the allowance of the appeal, were not such entries as could be made by him in his official capacity, and were of no validity; 3. That the court erred in dismissing the appeal. *Kimpeon v. Hunt*, 840.

5. The act entitled "An act to amend an act to incorporate and establish the city of Dubuque," provides for no appeal, or other mode of review, in cases arising under section three of that act. *Rogals v. The City of Dubuque*, 843.

6. On appeal to the District Court, in a criminal case, the record from the justice constitutes no part of the evidence, on the trial anew in the District Court. *Bryan v. The State*, 849.

7. Where in a proceeding before a justice of the peace, under the act "for the suppression of intemperance," approved Jan. 22, 1855, under which certain liquors were seized, the owner of the liquors filed a plea to the jurisdiction of the justice, which was overruled; and where the said owner then moved to dismiss the suit, for the want of jurisdiction, which, having been overruled, he then demanded a trial by a jury of twelve men, which was also overruled, and the said liquors were found to be forfeited by a jury of six men, and judgment

rendered upon their verdict, accordingly; and where the judgment of the justice, on appeal, was affirmed in the District Court; *Held*, That there was no error in the proceedings. *Id.*

8. An appeal lies from a judgment of nonsuit, rendered by a justice of the peace. *Wilson v. Johnson*, 463.

9. On appeal, the cause is to be tried on its merits, and errors and irregularities before the justice, disregarded. *Id.*

10. An order of the county court, establishing a road, is not a matter affecting the rights of any person, as distinguished from the public; and to appeal is allowed by law, from such an order. *Myers v. Simms*, 500.

11. Where the plaintiff and twenty-one other persons petitioned for the establishment of a road, and upon the coming in of the report of the commissioners appointed to examine as to its expediency, the defendant and twenty-nine other persons remonstrated against its being established; and where the defendant claimed compensation for the damages he would sustain, if the road was opened, which were assessed by appraisers, and paid into court, for his use; and where the county court, after hearing the parties, ordered that the road be established and worked as other roads, from which order the defendant appealed; and where the District Court dismissed the appeal, on the ground that the defendant had no such interest in the subject matter of the order of the county court, as authorized him to take the appeal; *Held*, That the appeal was properly dismissed. *Id.*

12. A party may appeal from an order of the District Court, quashing an original notice. *Elliott v. Corbin*, 564.

13. Where an account against a county, was rejected by the county court, from which decision, an appeal was taken to the District Court; and where the said county filed an answer in the District Court, pleading a set-off, and a former adjudication; and where the plaintiff moved to strike the answer from the files, for the reason that no pleadings can be filed after appeal, which motion was overruled by the court; *Held*, That the court did not err in refusing to strike out the answer. *Ford v. Jefferson County*, 568.

APPEARANCE.

1. Where a defendant has taken objection to the defective service of process, in the proper time and manner, and his objection is overruled, and he required to plead to the action, he does not waive or lose the benefit of his objection, by appearing and pleading. (WRIGHT, C. J., *dissenting*.) *Converse, Adm'r v. Warren*, 158.

2. Such an appearance must be considered to have been made under protest, and subject to the exception taken to the decision of the court on the objection to the sufficiency of the service.

ARBITRATORS.

1. The appellate court will presume in favor of the regularity of the proceedings of arbitrators. *McKinney v. The Western Stage Co.*, 420.

2. Where parties submitted to arbitrators, a controversy wherein the plaintiff claimed damages for injuries resulting to his wife, by reason of the upsetting of the defendant's coach, and provided in the submission, that the award should be returned to the clerk of the District Court, and judgment entered thereon by the clerk, in vacation; and where the arbitrators made an award in favor of the plaintiff, upon which judgment was rendered by the clerk of the District Court, under the terms of the submission; and where the defendants then filed their petition for a writ of error *coram nobis*, to inquire into the regularity of the proceedings before the arbitrators, as well as the regularity of

the entry of the said judgment by the clerk; and where at the next term of the said District Court, said writ, on motion of the plaintiff, was dismissed, and the judgment entered by the clerk vacated; and where the award was adopted by the court, and judgment entered thereon in favor of the plaintiff; *Held*, 1. That the writ was properly dismissed; 2. That any loss to the husband, in consequence of being deprived of the society of the wife, or being put to expense on account of the injury received by her, could be legitimately considered by the arbitrators under the terms of the submission. *Ib.*

ASSAULT AND BATTERY.

1. A battery is only an aggravation of an assault; when the assault is charged to have been made with a dangerous weapon, it is still a further aggravation; and where it is charged to have been made, with intent to commit a great bodily injury, it is only an offence in a different degree. *Cobely v. The State*, 477.

2. The assault is still the original offence; and the means—the intent—and the extent to which it is carried—qualify only the aggravation of this original offence, to which additional punishment is often affixed by the statute. *Ib.*

3. An indictment is not double, because an assault is described with additional incidents of aggravation. *Ib.*

4. Where a party is convicted of an assault and battery, a judgment may be rendered against him in his absence. *Hughes v. The State*, 554.

ASSIGNMENT.

1. Where in an action on three promissory notes, the defendant pleaded that the plaintiff held the notes as assignee of St. M., for the benefit of his creditors, and that the notes were accommodation notes for the benefit of St. M.; and where the defendant gave the plaintiff notice to produce the original assignment from St. M., which, not being produced, the defendant claimed that such refusal raised the presumption that the assignment contained something that would defeat the plaintiff's right to recover, which view of the law, the court overruled; *Held*, That the neglect or refusal of the plaintiff to produce the original assignment, only had the effect to admit secondary proof; and that there was no error in the ruling of the court. *Hunt v. Collins*, 56.

2. A party in possession of a promissory note by assignment, is presumed to be the owner. *Kelley v. Ford*, 140.

3. When the note is assigned before maturity, such assignment is *prima facie* evidence, that the note was received by the holder, upon a valuable consideration, in the usual course of business. *Ib.*

4. Whatever may be the state of facts as to the consideration, between the maker and payee, there is no presumption against the holder, that he has not paid a valuable consideration for the note; and a jury will not be authorized by any evidence of fraud or want of consideration, between the original parties to the note, to infer that it was assigned after maturity, or that no consideration was paid for it by the holder. *Ib.*

5. The assignment itself imports a consideration, and until the presumption of consideration is rebutted, the holder need offer no other proof. *Ib.*

6. Where the maker of a promissory note claims that the assignee received the note, with notice of fraud, or want of consideration in its inception, such notice must be proved; and the assignee cannot be charged with such notice, by reason of any want of diligence on his part, in ascertaining the fact of such fraud or want of consideration, even when he is in a situation where such facts could be ascertained by inquiry. *Ib.*

7. Where there is a sufficient defence, as between the payee and the maker of a promissory note, the innocent holder cannot be called upon to account when, or upon what consideration the note was transferred to him, or how it came into his hands, until after something has been shown affecting the *bona fides* of his possession. *Ib.*

8. Where suit is brought on a promissory note in the name of an assignee, to which the defendant pleads fraud and the want of consideration, the *onus* of showing the fraud and want of consideration, and that the plaintiff is not a *bona fide* holder of the note, for a valuable consideration, without notice of the alleged fraud, rests upon the defendant. *Ib.*

9. The title to a land warrant will not pass by delivery, without assignment. *Holland et ux. v. Hensley et al.*, 222.

10. The assignment of a promissory note, secured by mortgage, carries the mortgage with it; and the assignee may maintain an action upon the mortgage in his own name to enforce the lien. *Crow, McCreary & Co. v. Vance*, 434.

11. The right of the mortgagee is a mere chattel interest, inseparable from the debt it is intended to secure, and transferable by a mere assignment of the debt, without deed or writing. *Ib.*

12. By the assignment of the debt, the assignee is entitled to use all the remedies the assignor might have used, to enforce the lien of the mortgage against the debtor. *Ib.*

ATTACHMENT.

1. The allegations in a petition which are intended as a basis for a writ of attachment, do not touch the cause or right of action; and if insufficient, cannot be reached by demurrer. *Hunt v. Collins*, 56.

2. Where the allegations in a petition for an attachment, are insufficient, or where they are improperly alleged, they are to be reached by a motion directed at the writ of attachment. *Ib.*

3. Where a decision of the District Court, dissolving an attachment, is appealed from in due time, and a supersedeas bond filed, the decision of the court is suspended; and if reversed, the property seized under the attachment is still held by the writ. *Danforth, Davis & Co. v. Carter & May*, 230.

4. Where property was seized by attachment, some of which being perishable, was sold by the sheriff, and the proceeds thereof paid over to the clerk of the District Court; and where at the June term, 1855, of the District Court, and on the 2d day of the month, the attachment on motion of defendant, was dissolved without any order respecting the property attached, upon which the sheriff delivered the attached property remaining in his hands, and the clerk paid over the proceeds of the property sold, to the defendant's attorney, "taking an accountable receipt;" and where on the 6th day of June, and during the same term, the plaintiff appealed from the judgment of the court dissolving the attachment, and filed a supersedeas bond, which judgment was reversed by the Supreme Court; and where at the next term of the District Court after such reversal, the plaintiff obtained judgment against the defendant on his claim, and thereupon moved for a judgment against the property attached, and for a special execution, which motion was overruled; *Held*, That the property attached was still liable, and that the court erred in overruling the motion for a judgment against the property, and for a special execution. *Ib.*

5. The facts alleged in an affidavit or petition for an attachment, cannot be controverted, and an issue raised thereon, in the principal suit. *Sackett, Belcher & Co. v. Partridge & Cook*, 416.

6. Such issues can be made only in an action on the attachment bond. *Ib.*

7. The fact that the plaintiff has not recovered the whole of the claim for which suit was brought, affords no ground for quashing an attachment *pro tanto*. *Ib.*

8. In a suit commenced by attachment, where issue is taken on the facts alleged in the petition as a ground for the attachment, the allegations set forth in other petitions for attachments against the same defendants, and in which suits, judgments have been rendered by default, are not admissible in evidence to prove the facts alleged in such petition. *Ib.*

ATTORNEY.

1. In the absence of a party, there is no good reason why an affidavit for a continuance, should not be made by the attorney, if the interest of his client requires it, but the absence of the client should be shown in the affidavit. *Widner v. Hunt*, 355.

2. It is not competent for an attorney to swear to facts which are solely within the knowledge of his client, unless the client is absent. *Ib.*

BILL OF EXCEPTIONS.

1. Where several bills of exception referred by letters, as A, B and C, &c., to motions, demurrers and pleadings, and the papers in the record, referred to, were marked L, M, N, &c., and there were no papers in the record, corresponding with the letters named in the bills of exception; *Held*, That the appellate court would be justified in disregarding the papers not correctly referred to in the bills of exception. *Bryan v. The State*, 349.

2. A party may insist on having the instructions read to the jury before they retire to consider of their verdict, and if the court refuse him this right, he may take his exception. *Tully v. Lusk*, 469.

3. It is the duty of a party to ascertain at the proper time, what instructions are given or refused, and to take his exceptions accordingly. *Ib.*

4. Where a party is dissatisfied with the instructions given, or where the court refuses to give instructions asked for by him, he must except at the time of giving and refusing such instructions. *Ib.*

5. Where a party fails to take his exceptions to the ruling of the court, in refusing instructions, at the time of such refusal, it is too late to do so after verdict. *McKell v. Wright, Evans & Co.*, 504.

6. Where a party fails to except to the ruling of the court, in refusing instructions, at the time of such refusal, the appellate court will not inquire whether the instructions were improperly refused. *Ib.*

7. Where in a proceeding seeking the specific performance of a contract for the conveyance of land, a controversy arose in the Supreme Court, whether the complainant had in the District Court, introduced certain receipts (now lost) showing the payment of the purchase money; and where, upon the *ex parte* affidavits submitted by the parties, as to the fact in controversy, it was left in great doubt, whether such receipts had been produced and offered in evidence; *Held*, That the court might either determine the case upon the record and affidavits, or might, in the exercise of a sound discretion, remand the cause, for the purpose of having the District Court embody, in a proper bill of exceptions, the facts as to the proof made on the hearing. *Tasker v. Marshall*, 544.

BOND FOR COSTS.

1. After allowing a change of venue, the District Court cannot require the applicant to give to the adverse party, a bond to secure him against the addi-

tional costs which may be incurred by such change of venue. *Eddie v. Kasey*, 539.

2. Where the defendant in an action, filed an affidavit, and motion for a change of venue, on account of the interest and prejudice of the judge, which motion was granted at the May term, 1855, and an order of court made changing the venue to Warren county, in the ninth judicial district; and where, at the same term, and after the change of venue had been ordered, the court ordered the defendant to give a bond, in the penalty of \$200, to secure the plaintiff in the additional costs to be incurred by the change of venue; and where at the September term of said court, on motion, the cause was re-docketed, and on the trial, both parties appearing, the jury disagreed, and the cause was continued; and where at the May term, 1856, the defendant filed an affidavit for a change of venue to some other county, for the reason that the inhabitants of Boone county, were so prejudiced against him, that he could not expect a fair and impartial trial, which application was overruled; *Held*, 1. That the court erred in requiring the defendant to execute a bond for the costs; 2. That section 1708 of the Code, which limits a party to one change of venue, did not apply to the case; and 3. That the court erred in overruling the second application for a change of venue. *Ib.*

CERTIORARI

1. A writ of *certiorari* is the proper method of trying the regularity and validity of the proceedings of the county court in establishing a road. *Myers v. Simms*, 509.

CHURCH.

1. Where lands are granted to individuals, for the use of a church, which at the time of the grant, is not incorporated as such, the persons to whom the grant is made, stand seized to the use, and when the church receives legal capacity to take and hold the real estate, the statute executes the possession to the use, and the estate vests. *Miller v. Obittenden et al.*, 252.

2. Where J. M. being desirous, (as the deed recites,) to promote the cause of true religion in the town of Keokuk, and in consideration of one dollar, in hand paid, conveyed certain real estate to C. and four other persons, and their successors, as trustees, in trust, for the use, benefit and support of an orthodox Congregational Church at the town of Keokuk, to be called and named the Congregational Church of Keokuk, and said trustees were instructed and enjoined, to appropriate the land conveyed, and every part thereof, and all moneys arising from the sale, lease, or rent thereof, to the use, benefit, and support of the first orthodox Congregational Church which shall be organized at the said town, under the title aforesaid, and until such church shall be organized at the said town, the said trustees shall invest all such moneys, and allow them to accumulate for the benefit of said church, until the period of such organization; and where the trustees on the day of the execution of the deed, accepted the trust in writing, and agreed to execute the same; and where the said J. M. after the execution of said deed, in his last will and testament, bequeathed certain real estate to his executors, in trust for his children, and to be conveyed to said children at the expiration of ten years from the date of said will, upon certain conditions, and if either of said children, in the judgment of said executors, failed to comply with such conditions, then the share of such child, was to be conveyed to the said trustees, for the use and support of a Congregational Church at Keokuk; and where the trustees, after the death of the testator, took possession of the real estate so conveyed, and subsequently a Congregational Church, bearing the name indicated in the deed, was organized; *Held*, 1. That the gift to the church, in contemplation of its organization, was valid, and the use good; 2. That the gift was a charity in its largest and most comprehensive sense, as understood either in morals or in law, and a trust in

the narrow and more restricted sense, as applied to conveyances between individuals, which courts of equity have always recognized and enforced; 3. That the estate vested in the trustees, until the beneficiaries for whom the charity was intended, were in a condition to call for the application of the fund in the hands of the trustees; 4. That the use was not bad, because the trustees named in the deed, had no power to organize the church, or bring it into existence. *Id.*

COMMON CARRIER.

1. It is the duty of stage proprietors, who run a line of coaches for the conveyance of passengers, to prepare good coaches, harness and horses, and good, skillful and careful drivers; and should they fail to do so, and their passengers are insured by such failure, they are responsible. *Sales v. The Western Stage Co.*, 547.

2. Carriers of passengers for hire, are not only to furnish good coaches, harness and horses, and skillful and careful drivers, but they are to keep them in good repair, and to see that their drivers drive with the utmost skill and prudence. *Id.*

3. They are bound to exert the utmost skill and prudence, in conveying their passengers, and are responsible for the slightest negligence or want of skill, either in themselves or their servants. *Id.*

4. They are bound to use such care and diligence, as a most careful and vigilant man would observe, in the exercise of the utmost prudence and foresight. *Id.*

COMMON LAW.

1. The common law is in force in the state of Iowa. *O'Ferrall v. Simplot*, 381.

2. The ordinance of 1787, for the government of the Northwest Territory, made the common law the law of that territory; that ordinance was extended over Wisconsin, and then over Iowa; and although the laws of Wisconsin and Michigan were repealed by the legislature of Iowa, in 1840, the ordinance of 1787 was not affected by that repeal, but remained in full force. *Id.*

3. At common law, for an injury to the person of the wife, during coverture, by battery, or to her character, by slander, or for any such injury, the wife must join with the husband in the suit. But where the injury is such that the husband receives a separate loss or damage, as if, in consequence of the battery, he has been deprived of her society, or been put to expense, he may bring a separate action in his own name. *McKinney v. The Western Stage Co.*, 420.

4. This rule of the common law upon this subject has not been changed by the Code. *Id.*

COMPLAINANT.

1. Where there are several respondents to a bill in equity, against whom the same claim to relief is made, some of whom deny the right of the complainant to the relief sought, while others allow defaults to be entered against them, the complainant is not entitled to a decree against those in default, unless he establishes his right to the relief prayed for against those who have appeared. *Pierson v. David et al.*, 410.

2. A complainant in chancery is required to satisfy the chancellor that he is entitled to relief, although there has been no appearance by the respondent. *Id.*

3. If the proof made, shows a want of equity in the complainant's case, he must fail in his suit. *Id.*

CONSIDERATION.

1. A voluntary agreement, without any valuable consideration, cannot be enforced against the heirs of the party making the agreement. *Holland et ux. v. Hensley et al.*, 222.

2. If a contract by which a trust is created, is complete and executed, it will not be disturbed for want of a consideration; but courts of equity will not carry into effect a mere voluntary agreement, contract, or covenant, to transfer property. *Ib.*

3. The want of a consideration, is universally a good defence to a bill for rectifying a voluntary conveyance, or enforcing a voluntary agreement. *Ib.*

4. The meritorious consideration of providing for a child has always been held sufficient to authorize the enforcement of an executory contract against the party contracting; but where the contest is between one child and other children of the same ancestor, the meritorious consideration operates on both sides, and being equally balanced, equity will not interfere, or lend its aid. *Ib.*

CONSTITUTION.

1. Section nineteen of the act entitled "An act to authorize general incorporations," approved February 22d, 1847, which provides that when no corporate property can be found, on which to levy execution against the corporation, the acting manager, or some member of the company, may be notified to appear before the District Court of the county where the judgment was obtained, and show cause why the individual property of the members of the company should not be made liable, is not unconstitutional or unreasonable. *Hampson et al. v. Weare et al.*, 13.

2. Neither the jurisdiction, nor the proceedings, of courts and magistrates, as existing at common law, were unalterably settled and defined by the constitution of the United States, at the time of its adoption. *Bryan v. The State*, 349.

3. Section eleven of the first article of the constitution of the state of Iowa, which provides that no person shall be held to answer for a criminal offence, unless on presentment or indictment by a grand jury, except in cases cognizable before a justice of the peace, does not limit the jurisdiction of justices of the peace to causes that were cognizable before that officer, at the time of the adoption of that constitution. *Ib.*

4. The eleventh section of the first article of the constitution of Iowa has a prospective sense, and embraces such causes as may be made cognizable before justices of the peace. *Ib.*

CONTINUANCE.

1. A court in the exercise of its discretion may grant a continuance, on account of the absence of counsel. *Brady v. Malone*, 146.

2. To show due diligence in an affidavit for a continuance, it is not sufficient to state generally that such diligence has been used; but the affiant should specify what he has done, that the court may judge of the diligence. *Ib.*

3. What is, or is not, due diligence, is to be determined by the court, and not by the affiant. *Ib.*

4. Affidavits for a continuance should be construed strictly, and most strongly against the applicant. *Ib.*

5. Where suit was commenced on a promissory note, prior to the June term, 1855, of the Lucas District Court, at which term, the defendant filed an affidavit for a continuance, on account of the absence of certain witnesses resid-

ing in Ohio, and the cause was accordingly continued, and where at a subsequent term (but whether at the September term, 1855, or 1856, it is impossible to determine from the record), the defendant filed a second application for a continuance, based upon an affidavit, which, after stating what he expected to prove by certain absent witnesses, alleged that his counsel was absent, without stating any cause of absence, or that such absence was unexpected to defendant; and that at the time of making the former affidavit (on which the first continuance was obtained), he was informed and believed, that both of the witnesses resided in Guernsey county, Ohio, but he soon thereafter learned, that one of them was still in California, and had not returned to his home in Ohio, as he had been informed; that for about six weeks or two months of the time since the first continuance, his family was sick, so that he could not attend to his business; that since he learned that one of the witnesses was in California, he has endeavored, *by all means in his power*, considering the sickness of his family, to ascertain the place of residence of the witness, but had not been able to learn the same; *Held*, That the affidavit was insufficient, and the application for a continuance was properly overruled. *Id.*

6. The law does not contemplate that a party is entitled to a continuance, *only* in the event that a witness is absent by whom he can *fully* prove a particular fact; but, if from the witness, he can obtain testimony tending to substantiate particular facts—or, if his testimony will materially assist in determining the issues joined—he has a right to the presence or deposition of the witness, unless there is some other witness by whom the same facts can be substantiated, to the same extent as they would be by the absent witness. (BROCKTON, J., *dissenting*.) *Welsh v. Savory*, 241.

7. It is that which the absent witness would swear to, at present, that the affiant claims the benefit of, by his affidavit; and when he swears that he knows of no other witness by whom he can prove such fact or facts, as *fully* as he can by the one then absent, he complies with the statute. *Id.*

8. A party applying for a continuance on the ground of the absence of a witness, need not state in his affidavit, that he cannot fully prove—that is, that he cannot fully substantiate or demonstrate by any other witness, the facts or matters he expects to prove by the absent witness. If he knows of no other means within his reach, by which he can supply the defect in his testimony, occasioned by the absence of the witness named, and makes this, as well as the other matters required by the Code, to appear, he substantially complies with the law, and should have time, ordinarily, to obtain his proof. *Id.*

9. An affidavit for a continuance, on the ground of the absence of witnesses, which does not show that any effort has been made to procure their attendance, nor any excuse for the want of that diligence which the law requires, is insufficient. *Widner v. Hunt*, 355.

10. In the absence of a party, there is no good reason why an affidavit for a continuance, should not be made by the attorney, if the interest of his client requires it, but the absence of the client should be shown in the affidavit. *Id.*

11. It is not competent for an attorney to swear to facts which are solely within the knowledge of his client, unless the client is absent. *Id.*

12. An affidavit for a continuance, on the ground of the inability of a witness to attend the court, should show that a knowledge of such inability on the part of the witness, was not known to the party asking the continuance, before the commencement of the term, and in time to have taken the testimony by deposition. *Id.*

13. A palpable case of injustice must be presented, before the appellate court will interfere with the discretion of an inferior court, in granting or refusing a continuance. *Id.*

14. The practice of allowing affidavits for a continuance to be amended, or a new affidavit to be filed, when the first has not made out the case desired to be shown by the party, is one which the courts should permit with great caution, if permitted at all. *Ib.*

15. It is within the discretion of the District Court, to refuse leave to amend an affidavit for a continuance, adjudged insufficient, or to file a new one, unless for the purpose of presenting facts which have transpired, or come to the knowledge of the party, since the filing of the first. *Ib.*

16. An affidavit for a continuance, on the ground of the absence of witnesses, that does not show that any diligence has been used to obtain the testimony of such witnesses, nor any excuse for the want of such diligence, is insufficient. *Adams v. Peck*, 551.

CONTRACT.

1. The terms applied by the parties to the sum fixed upon in a contract, will not always define and fix the action of the court in giving a construction to the contract. *Foley v. McKeegan*, 1.

2. A contract for the transportation of intoxicating liquors, is not void *per se* under the act for the suppression of intemperance, approved January 22, 1855. *Bowen & King v. Hale*, 430.

3. Where a controversy arises in our courts, upon a contract made in another jurisdiction, *prima facie* it is to be governed by the laws of this state. *Bean v. Briggs & Felthouser*, 464.

4. If it is claimed that the law of the place of contract, establishes a rule unknown to our law, such foreign law should be proven, and to be admissible in proof, should be properly averred, or set out in the pleadings. *Ib.*

5. Where a party contracts, or is liable to pay "in good property," an action cannot be sustained against him; until after a demand of property in payment. *Plummer v. Roads*, 587.

COSTS.

1. Where a plaintiff dismisses his suit, he is liable for all the costs legally made in the case, and not alone for those that may be taxed at the time the suit is dismissed. *Acres v. Huncock*, 568.

2. A plaintiff cannot, by dismissing his suit, and paying costs before the return of the writs and process in the hands of the officer, avoid the payment of the costs made thereon. *Ib.*

3. Where a transcript from a justice of the peace, does not show the amount of the costs in the case, the District Court may require the justice to certify to that court, the amount of such costs. *Ib.*

See BOND FOR COSTS, 1 and 2.

COURTS.

1. The proceedings and judgment of a court, within its jurisdiction, cannot be inquired into and set aside, in a collateral proceeding. *Hampson et al. v. Weare et al.*, 13.

2. As to courts superior and of general jurisdiction, every presumption is in favor, not only of their proceedings, but of their jurisdiction. *Morrow v. Weed*, 77.

3. This presumption does not prevail, however, in relation to the jurisdiction.

tion of a court inferior and of limited jurisdiction, but such jurisdiction must be shown. *Ib.*

4. When the *jurisdiction* of an inferior court is shown, then the same presumption prevails in favor of its proceedings, that does in favor of those of a superior court. *Ib.*

5. Whatever intendment may be made in favor of the decision of an inferior court, there can be none in aid of its right to decide. *Ib.*

6. When inferior courts have not transcended their powers, and their jurisdiction has actually attached, such jurisdiction will not be lost by an irregularity in the mode of exercising it: and every intendment will be made in aid of the validity of the proceedings under it, which will be regarded as equally conclusive with those of courts of superior and general jurisdiction. *Ib.*

7. A superior court is presumed to act rightly, and within its jurisdiction. *Ib.*

8. An inferior court should set out the requisite facts on the face of its proceedings; and when the jurisdictional facts are thus stated, such statement is taken as *prima facie* evidence, or they are presumed to be as stated. *Ib.*

9. When a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. *Ib.*

10. Jurisdiction is conferred: 1. By the law; 2. By a petition, or whatever stands in its place; 3. By notice, when such is required. *Ib.*

11. If there be a petition, or the proper matter of that nature, to call into action the power or jurisdiction of the court, its sufficiency cannot be called in question in a collateral proceeding. *Ib.*

12. If there be a notice or publication, or whatever of this nature the law requires, in reference to persons or other matters, its sufficiency cannot be questioned collaterally. *Ib.*

13. Courts are acting judicially, as long as they effectuate the intention of a donor. *Müller v. Chittenden et al.*, 252.

14. Where in a proceeding in Chancery to set aside a guardian's sale of real estate, it was alleged that the ward never had any legal notice of the application to sell the real estate; and where it appeared from the record of the county court, which granted the license to sell, that it had been "proved to the satisfaction of that court, that notice, according to law, had been given" of the hearing of said petition to sell said real estate; *Held*, That the decision of the county court on the sufficiency of the service of notice, could not be examined into collaterally. *Wade v. Carpenter et al.*, 361.

15. The approval by the county court of a sale of a minor's real estate by his guardian, as required by section 1506 of the Code, in order to make the sale valid, is not a mere formality. *Ib.*

16. The courts of Iowa will not take judicial notice of the laws or statutes of another state. *Bean v. Briggs & Felthouser*, 464.

CONVEYANCE.

1. If a conveyance of real estate be so uncertain in its description, that it cannot be known what estate was intended, the conveyance will be void. *Glenn et al. v. Malony*, 314.

2. If the description in the instrument includes several particulars, all of which are necessary to ascertain the estate to be conveyed, none will pass, except such as corresponds with every particular of the description. *Ib.*

3. If there shall be in the instrument, a repugnant call, which by the other

descriptive terms, clearly appears to have been made through mistake, the conveyance is not void, by reason of such repugnant call. *Ib.*

4. When the instrument is applied to its subject matter, if it be found that the description in it, is true in part, but not true in every particular, so much of it as is false, is to be rejected; and the conveyance will take effect, if sufficient remains to ascertain its application. *Ib.*

5. Where the husband alone conveys real estate, the dower of the wife, upon his death, is to be governed by the law in force at the time of making the conveyance by the husband, and not by that in force at the time of his decease. *O'Ferrall v. Simplot*, 381.

CORPORATION.

1. Section nineteen of the act entitled "An act to authorize general incorporations," approved February 22d, 1847, which provides that when no corporate property can be found, on which to levy execution against the corporation, the acting manager, or some member of the company, may be notified to appear before the District Court of the county where the judgment was obtained, and show cause why the individual property of the members of the company should not be made liable, is not unconstitutional or unreasonable. *Hampson et al. v. Weare et al.*, 13.

2. It was not the intention of the statute to drive the creditor to the inconvenience, expense and delay of suits against all, or any of the stockholders, after he had obtained his judgment against the corporation. *Ib.*

3. Where a judgment is obtained against a corporation, and an order is obtained that execution be levied on the individual property of the members thereof, the execution should follow the judgment, and run against the corporation, with a clause that it be levied on the property of the members. *Ib.*

4. Where in a proceeding for an injunction, it appeared that W. obtained a judgment in the District Court, against a corporation organized in 1851, upon which execution issued, which was returned, "no corporate property can be found, sufficient to satisfy the same;" that notice was served upon the president and several of the directors of the company, to show cause why the individual property of the members should not be made liable, and such proceedings were had, that the court rendered judgment that an execution issue against the property of the members; that an execution issued against certain individuals, as members of the corporation, naming them, who sued out the injunction, staying the execution and all proceedings under it, which injunction was dissolved by the District Court; and, where the reasons stated in the application for the injunction, were as follows: 1. That the private property of the members of the corporation was exempt; 2. That the proceedings to render the stockholders liable, should have been conducted under the Code, and not under the act of 1847; 3. That the court could not render the stockholders liable for more than the amount of their stock; and 4. That they were liable, even to the company, only on certain conditions; *Held*, 1. That all the grounds stated in the application for the injunction, were questions for the court to determine, before it ordered execution to issue against the individual property of the stockholders, and its judgment upon them was conclusive, unless appealed from; 2. That the execution issued against the individuals was irregular, and was properly stayed by the injunction; 3. That the court erred in dissolving the injunction. *Ib.*

5. An ordinance of a municipal corporation can have no extra-territorial force; but persons or property coming within the territorial limits of the corporation, come under its authority. *Gosselink v. Campbell*, 296.

6. Where a city charter, adopted in pursuance of the provisions of chapter 42 of the Code, gave to the city council the power to establish such by-laws and ordinances as may be necessary and proper for the good regulation, health

and safety of the citizen, and the cleanliness of the city; to prohibit stock from running at large in the city; and to make any other ordinary, suitable and proper police regulations, and to impose fines and penalties for the violation of such regulations, by-laws and ordinances; and where the city council, acting under such charter, adopted an ordinance, prohibiting hogs from running at large, the first section of which provided, that no hogs shall be allowed to run at large in the city, and owners are required to keep them up, and that any person failing to comply with the ordinance, shall be deemed guilty of a misdemeanor, and pay a sum not less than one, nor more than five, dollars; and the second section of which, made it the duty of the marshal to take up all hogs found running at large in the city, and advertise them; and if the owner did not, within three days, come and pay the fine and costs, and take care of the hogs, to sell them to the highest bidder; and after paying the fine and costs, to pay the balance of the money to the owner; and where an action of replevin was brought against the city marshal, by a party residing beyond the corporate limits, to recover the possession of certain hogs belonging to him, found running at large within the corporation, and taken up under the ordinance; *Held*, 1. That the city had authority, under the charter, to pass the ordinance; 2. That the city marshal had authority, under the ordinance, to take up the hogs; 3. That the first section of the ordinance is within the meaning and spirit of the statute and the charter; 4. That the second section of the ordinance, was sufficient for the abatement of the nuisance and the payment of the charges, but not for the enforcement of the fine. *Id.*

7. A municipal corporation may be summoned as garnishee, under the statute of Iowa, and the indebtedness of such corporation to the party defendant, held to respond to the judgment of the plaintiff. *Wales & Son v. The City of Muscatine, Garnishee*, 302.

8. Where the plaintiffs issued execution on a judgment in their favor against B. and the sheriff summoned as garnishees, P., mayor, and J., recorder of the city of M., who, at the ensuing term of the District Court, appeared and answered the interrogatories propounded, from which it appeared, that the city of M. was indebted to B. in a sum certain, for work done on the steamboat landing; and where the plaintiffs moved for judgment against the city of M. for the sum shown to be due B., which motion was objected to by B. and overruled by the court, for the reason that a municipal corporation could not be held as garnishee; *Held*, 1. That B. had no right to make any such objection to the rendition of judgment against the garnishee; 2. That the court erred in overruling the motion for judgment against the city of M. *Id.*

CREDITOR'S BILL.

1. In proceedings under a creditor's bill, to reach real estate alleged to have been fraudulently conveyed, neither the answer of the grantor, in a chancery suit, nor his oral declarations made, nor letters subsequent to the conveyance, are receivable in evidence to affect the title of the grantee, without evidence that the grantee colluded with the grantor, with a fraudulent intent. *De France v. Howard et al.*, 524.

2. And the declarations of the grantor, made after such conveyance, are not receivable in evidence, to show such collusion. *Id.*

CRIMINAL LAW.

1. When the law speaks of selling intoxicating liquors, directly or indirectly, or on any pretence, or by any device, it is only designed to describe different methods of committing the same offence; and it is not necessary that an information should state in what method the selling was accomplished. *Devine v. The State*, 443.

2. Whether the person charged, has sold intoxicating liquors, directly or in-

directly, or by whatsoever pretence or device, it is still the same offence; and the law in no sense treats the different means made use of to effect a sale, as constituting a different offence, nor yet as a different species of the same offence. *Ib.*

3. The marriage of persons, without their having obtained a license, is to be dealt with as a misdemeanor, and in no other manner. *White v. The State*, 449.

4. Where an indictment charged that the defendant, "on or about the 9th day of June, 1856," "committed an assault and battery upon the person of H. with intent to inflict on the person of H. a great bodily injury;" *Held*, 1. That time was sufficiently alleged in the indictment; 2. That the indictment did not charge two distinct offences. *Colony v. The State*, 477.

5. In the case of a misdemeanor, where the fact charged in the indictment, appears to be unlawful, it is unnecessary to allege the act to have been unlawfully done. *Copps v. The State*, 502.

6. Such an averment is in no case essential, unless it be part of the description of the offence, as defined by statute. *Ib.*

7. Where the offence on the part of those keeping a house of prostitution or lewdness, could only be prohibited by a legal prosecution, and where the occupants could in no sense be said to be so far under the control of the lessor, as that his mere dissent or order, would amount to a prohibition, his mere failure to act, or to prohibit, would not amount to a permission. *Abrahams v. The State*, 541.

8. To make a lessor liable under section 2712 of the statute, for knowingly permitting the lessee to use his house for the purposes of prostitution and lewdness, there must be on the part of the lessor, a consent to such use, either expressly given, or given by his silent acquiescence. *Ib.*

9. A mere failure to interfere or to prosecute, so as to prevent the illegal use, cannot be construed to amount to a permission, or into a silent, affirmative acquiescence in such use. *Ib.*

10. The State must show such acts or circumstances as shall satisfy the jury, that the lessor, having knowledge that the house was being used for the illegal purpose, after the execution of the lease, not only remained inactive, but assented or consented to such use; and it is not for the lessor to show, that he took some steps to manifest his dissent or disapprobation. *Ib.*

11. Where a party was indicted for having leased a house, knowing that the lessee intended to use the same as a place or resort for the purpose of prostitution and lewdness, and for having knowingly permitted such lessee to use the same for such purpose; and where the court instructed the jury as follows: "That if the defendant leased the premises for a legal and proper purpose, not knowing that it was to be used for an illegal purpose; but after the lease was executed, the lessee kept a place of prostitution and lewdness, and the defendant had knowledge of such illegal use, and took no means to prevent the same, he would be liable under the indictment;" *Held*, That the instruction was erroneous. *Ib.*

12. Where a party is convicted of an assault and battery, a judgment may be rendered against him in his absence. *Hughes v. The State*, 554.

DAMAGES.

1. Whether the sum specified in a contract, as a penalty for the non-performance thereof, shall be considered as a penalty, or as liquidated damages, is a question of construction, on which the court may be aided by circumstances extraneous to the writing. *Foley v. McKeegan*, 1.

2. The subject matter of the contract—the intention of the parties—as well

as other facts and circumstances—may be inquired into, for the purpose of determining the construction to be given to the contract, though the words used are to be taken as proved exclusively by the writing. *Id.*

3. In giving a construction to such an instrument, the court must see whether the agreement contains one or several stipulations—whether such stipulations vary in importance—whether the damages are, in their nature, certain or uncertain, or difficult of definite ascertainment—or whether, where the injury is certain, the sum fixed upon, is proportionate or disproportionate to such injury, and the actual claim which grows out of it. *Id.*

4. The terms applied by the parties to the sum fixed upon in the contract, will not always define and fix the action of the court in giving a construction to the contract. *Id.*

5. Although the parties may call the sum fixed upon in the contract, a "penalty," or give it no name, or style it "liquidated damages," the court in any or all of such cases, treat the sum as one or the other, depending upon the nature of the agreement, the surrounding circumstances, the intention of the parties, and the reason and justice of the case. *Id.*

6. If, by the agreement, it is doubtful whether the parties intended that the sum specified, should be a penalty or liquidated damages, courts incline to treat the contract as creating a penalty to cover the damages actually sustained by the breach, and not as liquidated damages. *Id.*

7. Where an action was brought upon a written agreement, which read as follows: "I, J. M., have this day agreed and sold, 200 acres of land, the same more or less, [here follows a reference to the lands,] for which I am to receive \$880.00; \$550 of which I am now to receive, and the same is to be forfeited by F. M., if he does not pay the balance, on or before the 10th day of April, 1854, and then I will give the deeds of the aforesaid places, at the time the money is paid. I, the said J. M., promise to give the said M. F., next April, together with the lands, [here follows several items of personal property,] and to put 500 rails on the fence of the field. I also bind myself, under the penalty of \$50, to be paid to the said M. F., if I fail in the fulfillment of the aforesaid agreement; and to the aforesaid agreement, we both sign our hands;" and where the petition claimed damages for the non-performance of the contract; *Held*, That the sum inserted in the contract, to be paid on its non-fulfillment, was designed by the parties as a penalty, and not as liquidated damages. *Id.*

8. In an action against the vendor of real estate, for failing to convey, the measure of damages should depend upon the cause of the failure to convey. *Id.*

9. If the party selling is honest, and was prevented from making the conveyance by unforeseen causes, which he could not control, the plaintiff should recover only nominal damages. *Id.*

10. If the plaintiff has paid the price of the land, or any part thereof, and the defendant has failed to convey, from causes beyond his control, the plaintiff should recover the sum paid, with interest. *Id.*

11. But if the person selling is in fault, and either did or should have known that he could not comply with his undertaking; or having the title, refuses to convey, or having the title at the time of the agreement, afterwards disables himself from completing it, by a sale to a third person; or, at the time of the agreement, knew he had no title; in these, and in all cases where the inability to convey, arises from fraud in the covenantor, the purchaser should recover substantial damages, including compensation for any actual loss, as by the increased value of the land at the time the contract should have been performed. *Id.*

12. Where in an action to recover damages for the non-conveyance of real estate, on an agreement which contained the following provision: "I also

bind myself, under the penalty of fifty dollars, to be paid to the said M. F. (the plaintiff) if I fail in the fulfillment of the aforesaid agreement," and which agreement acknowledged the receipt of fifty dollars on the contract, the court instructed the jury, that by the terms of the agreement, the plaintiff was entitled to recover only one hundred and five dollars, being the fifty dollars paid by the plaintiff with interest, and the fifty dollars fixed as the penalty in the agreement; *Held*, That the instruction was erroneous, and that the penalty named in the agreement, was not the measure of the plaintiff's damages. *Ib.*

13. Under section 1831 of the Code, a defendant in default, for want of an answer, in a case where the damages are assessed either by the court or a jury, has no right to introduce evidence, for the purpose of reducing the damages, nor to address the jury, and comment on the evidence, nor to ask instructions. *Cook & Owsley v. Walkers*, 72.

14. Where a defendant in an action, who was in default for want of an answer, on the assessment of damages by a jury, asked leave to introduce evidence, for the purpose of reducing the amount of damages shown by the plaintiff—claimed the privilege of addressing the jury, and commenting on the evidence—and asked certain instructions—all of which, being objected to, were refused by the court, on the ground that the defendant had no right to do anything more than cross-examine the plaintiff's witness; *Held*, That the decision of the court was correct. *Ib.*

15. To call a woman a "whore," is actionable of itself, without proof of special damage. *Smith v. Silence*, 321.

16. Under the act entitled "An act to allow and regulate the action of right," approved December 29, 1838, and under chapter 116 of the Code, damages are recoverable in an action for dower. *O'Ferrall v. Simplot*, 381.

17. A doweress is entitled to recover damages for the detention of her dower, from the alienee of her husband, or his grantee, as measured by the use and profits at least, from the time of a demand of dower, provided the demand was not more than six years prior to the commencement of the suit. If the demand was more than six years before the action was commenced, she can only recover for the six years. *Ib.*

18. Words imputing to a female, a want of chastity, are actionable, without any proof of special damages. *Truman and wife v. Taylor and wife*, 424.

19. However much passion, produced by the provocation of the plaintiff, may operate to mitigate the damages in an action of slander, it cannot wholly defeat the plaintiff's action. *McClintock v. Crick*, 453.

DEDICATION.

1. A piece of land dedicated to the use of the public, as a *street*, may be used for the purposes of a *wharf*, for the landing of passengers and the depositing of freight, without any infringement of the right of the owner in fee of the land. *Haight v. The City of Keokuk*, 199.

DEED.

1. Where a deed conveyed certain real estate by the following description: "Section thirty-six (36), section thirty-five (35) east half, and southwest quarter and east half of northwest quarter of section nine (9), township seventy-seven, range eighteen west; and where it was claimed, that the deed conveyed the *whole* of section thirty-five, and the east half, and southwest quarter, and east half of northwest quarter of section nine; *Held*, That the deed conveyed only the east half of section thirty-five, and the southwest quarter, and east half of northwest quarter of section nine. *Scholle v. Rosiers et al.*, 328.

2. A deed takes effect from delivery; and a guardian's deed cannot be de-

¹ivered until after it is approved by the county court. Such approval is an affirmation, not merely of the deed, but of the sale. *Wade v. Carpenter et al.*, 361.

3. Under the act of January 4, 1840, entitled an act to regulate conveyances, it is essential to the validity of the acknowledgment of a deed by a *feme covert*, that the certificate of the officer taking it should show, that the contents of the deed were made known to the wife, and that she freely relinquished her right of dower in the premises. *O'Ferrall v. Simplot*, 381.

4. It is not necessary to the validity of a trust deed or mortgage, containing a provision, authorizing the grantee to sell the premises, on breach of certain conditions specified therein, that the grantee should join in its execution, or sign and acknowledge the same; or that he should signify his willingness to make the sale, or undertake the execution of the power, by any formal writing indorsed on the deed. *Leffler v. Armstrong*, 482.

5. Under such a conveyance, the grantee, upon breach of the conditions, may foreclose by sale, without the aid of a court. *Ib.*

DEFAULT.

1. Where it appeared from the record of a cause "that defendant filed an affidavit and motion to set aside the default heretofore granted, which motion coming on to be heard, the court overruled the same, and refused to set aside said default, and permit said defendant to answer, to which ruling the defendant at the time, excepted; and where it was contended in the appellate court, that no judgment by default was entered against the defendant, as contemplated by section 1824 of the Code; *Held*, That it appeared sufficiently from the record, that the defendant was in default. *Cook & Owsley v. Walters*, 72.

2. Under section 1831 of the Code, a defendant in default, for want of an answer, in a case where the damages are assessed either by the court or a jury, has no right to introduce evidence, for the purpose of reducing the damages, nor to address the jury, and comment on the evidence, nor to ask instructions. *Ib.*

3. Where a defendant in an action, who was in default for want of an answer, on the assessment of damages by a jury, asked leave to introduce evidence, for the purpose of reducing the amount of damages shown by the plaintiff—claimed the privilege of addressing the jury, and commenting on the evidence—and asked certain instructions—all of which, being objected to, were refused by the court, on the ground that the defendant had no right to do anything more than cross-examine the plaintiff's witnesses; *Held*, That the decision of the court was correct. *Ib.*

DELIVERY OF GOODS.

1. Where in an action of trespass to personal property, by the vendee against the sheriff and creditors of the vendor, it appeared from the evidence that at the time of the alleged sale to the plaintiff, the goods were in Illinois; that they were afterwards removed to Sabula, Iowa, and deposited in the name of the vendor, with certain warehousemen, who executed to the vendor the usual warehouse receipts; that in part payment for the goods, the vendee drew on one A. of New York, for four thousand dollars; that it was agreed between the vendor and vendee, that the goods should be deposited in these warehouses, in the name of the vendor, until said draft was duly accepted; that after the sale, the vendor and vendee went to Chicago, and there deposited the warehouse receipts with R. and S., indorsed in blank by the vendor, with the agreement that they were to be delivered to the plaintiff, or held by R. and S. for his use, whenever they were advised of the acceptance of the draft by A.; that the vendor was owing R. and S., and upon the acceptance of said

draft, they were to credit him with the amount; and that the draft was accepted, and notice given thereof to R. and S., or that R. and S. gave the vendor credit for the amount of the draft, prior to the levy of the attachments under which the defendants justified; and where the court instructed the jury as follows: That where goods are left with a warehouseman, who gives his receipt for the same, the sale of the goods, and assignment of the warehouse receipts, and delivery of them to the purchaser, is a delivery of the goods;" *Held*, That the instruction was correct. *Adams v. Foley et al.*, 44.

DEMAND.

1. Where a party contracts, or is liable to pay "in good property," an action cannot be sustained against him, until after a demand of property in payment. *Plummer v. Roads*, 587.

DEMURRER.

1. The allegations in a petition which are intended as a basis for a writ of attachment, do not touch the cause or right of action; and if insufficient, cannot be reached by demurrer. *Hunt v. Collins*, 56.

2. A demurrer is waived, by the defendant answering the petition. *Smith v. Silence*, 321.

3. If a party desires to have the appellate court review the decision of the District Court, in sustaining or overruling a demurrer, he must suffer judgment in chief to be rendered in that court, on the demurrer. *Plummer v. Roads*, 587.

4. Taking a bill of exceptions, will not raise any question for the adjudication of the appellate court, if the demurrer has been waived by pleading over. *Ib.*

DEMURRER TO EVIDENCE.

1. By demurring to the evidence, a party cannot withdraw a question of fact from the jury, and submit its decision to the court. *Jones v. Ireland*, 63.

2. The facts must be first ascertained and found, and admitted on the record, before a party can demur to the evidence. *Ib.*

3. By demurring to the evidence, the demurrant admits the truth of the facts found, and every conclusion in favor of the other party, which the evidence conduces to prove, or which the jury might have inferred from it in favor of his opponent. *Ib.*

4. The object of a demurrer to evidence is to obtain the opinion of the court upon the sufficiency of the evidence in law, to maintain the issue in fact. *Ib.*

5. An offer to demur to evidence, is not *stricti juris*. *Ib.*

6. If there be no colorable cause of demurrer to evidence, the court should not allow it. *Ib.*

7. Before joining in a demurrer to evidence, the plaintiff has the right to require an admission on the record, of the truth of all the facts that the evidence offered by him, tended to prove, or that the jury might infer from it in his favor. *Ib.*

8. Without such an admission upon the record, the plaintiff is not bound to join in the demurrer. *Ib.*

9. And if the plaintiff does join in a demurrer to evidence, without such an admission upon the record, the court can pronounce no judgment on the demurrer. *Ib.*

DEPOSITION.

1. Where notice was given of the taking of a deposition "at the office of Squire Moore, in Ashland, Wappello county, Iowa, on the 10th day of April, 1857, and it appeared from the caption and certificate of the deposition, that it was taken on the day named in the notice, at the office of Enos Moore, a justice of the peace, of Wappello county; *Held*, That the deposition was properly suppressed. *McClintock v. Crick*, 453.

2. Where a motion is made to suppress depositions, on the ground that the party was not allowed time for travel, from the place where the notice was served, to the place where the depositions were to be taken, in addition to the five days' notice allowed by the statute, the party making the motion, must show affirmatively that he is entitled to the additional time allowed for travel. *Adams v. Peck*, 551.

3. Where a commission to take a deposition, was directed to the "clerk of the District Court of Morgan county, Indiana," and the deposition was taken and certified by the "Clerk of the Court of Common Pleas of Morgan county, Indiana;" *Held*, That the deposition should have been suppressed. *Plummer v. Roads*, 587.

4. Where a commission to take depositions, is issued by the clerk, under the seal of the court, it will be presumed to have issued by the authority of the court. *Ib.*

5. Where the caption of a deposition stated that the deposition was taken "at the clerk's office of the Court of Common Pleas of said county," before said clerk (naming him), "at Martinsville, in said county and state, on Thursday, the 22d day of March, 1855, between the hours of nine o'clock, A. M., and 4 o'clock, P. M., of said day, pursuant to the commission hereto attached," &c.; and the clerk certified "that the said deposition was taken at my office in Martinsville, in said county and state, on Thursday, the 22d day of March, 1855, between the hours of nine o'clock, A. M., and four o'clock, P. M.;" that said deponent was by me duly sworn according to law; and that the foregoing deposition was written by me, and signed by said deponent in my presence;" *Held*, That taking the certificate, in connection with the caption, it sufficiently appeared, that the deposition was subscribed and sworn to by the deponent, at the time and place therein mentioned. *Ib.*

DESCRIPTION.

1. If a conveyance of real estate be so uncertain in its description, that it cannot be known what estate was intended, the conveyance will be void. *Glenn et al. v. Malony*, 314.

2. If the description in the instrument includes several particulars, all of which are necessary to ascertain the estate to be conveyed, none will pass, except such as corresponds with every particular of the description. *Ib.*

3. But if there are certain particulars, once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant. *Ib.*

4. The language used in the instrument or conveyance, must be reasonably construed; and the identity of the land ascertained from the entire description. *Ib.*

5. If there shall be in the instrument a repugnant call, which by the other descriptive terms, clearly appears to have been made through mistake, the conveyance is not void, by reason of such repugnant call. *Ib.*

6. When the instrument is applied to its subject matter, if it be found that the description in it is true in part, but not true in every particular, so much

of it as is false, is to be rejected; and the conveyance will take effect, if sufficient remains to ascertain its application. *Ib.*

7. Where in a proceeding in Chancery to recover the undivided half of lot 73 in the city of Dubuque, brought by the residuary legatees of D. S. deceased, it appeared that at the time of S.'s death, the lot was owned and occupied in common by him and respondent; that their title thereto was a pre-emption right, established and recognized by the commissioners appointed for that purpose, under the act of Congress of October 26, 1836, and an act amendatory thereto of July 2, 1837; that the respondent and another were the executors of said S.'s estate, and in due course of administration, sold all the real property of the testator, including the undivided half of the said lot; that the lot was bought by W. for its fair value, and by him afterwards conveyed to the respondent; that in November, 1854, the respondent obtained a patent for the lot from the United States; that the *inventory* of the testator's property, the notice of sale of said lot, and the return made by the executors of such sale, describe the property as "No. 7—town lot 72, on Main street, in the city of Dubuque—the undivided half of said lot—the whole being owned by L. M. (the respondent) and D. S.;" that the appraisement describes it as "No. 7—half of city lot, No. 72;" that the petition for the sale, prayed for an order to sell *all* the real estate of the testator, which embraced various parcels, among which was the "undivided half of lot 72, in the city and town of Dubuque;" that the fact of the application for an order to sell was entered on the probate records of Dubuque county, in which the property in controversy was described as "the undivided half of lot 72 in the city of Dubuque;" that an order was made, by the Probate Court, authorizing the executors "to sell the whole of said real estate in the inventory thereof specified;" that the deed to W., who purchased at the executor's sale, describes the premises as "the undivided half of lot 73, as designated on the government plat of said city of Dubuque; that the sale took place on the lot, and the bidders all understood that they were bidding on lot 73—the same being situate on the corner of Main and Third streets, while lot 72 is in another block, and was never owned by S. and M.; that in a subsequent report of the condition of the estate, the executors charge themselves with the sum of \$1,112, for "the undivided half of lot 72;" that a final settlement of the estate was made in 1861, at which time the complainants were present, either personally or by attorney, and "admitted the correctness of the account," and were then paid the amount ascertained to be due each by the terms of the will; *Held*, 1. That so much of the description of the lot as was false might be rejected, and the proceedings before the Probate Court, and the sale by the executors, sustained, on the ground that a sufficient description remained to show the application of those proceedings. *Ib.*

8. Where a deed conveyed certain real estate by the following description: "Section thirty-six (36), section thirty-five (35) east half, and southwest quarter, and east half of northwest quarter of section nine (9), township seventy-seven, range eighteen west; and where it was claimed, that the deed conveyed the *whole* of section thirty-five, and the east half and southwest quarter, and east half of northwest quarter of section nine; *Held*, That the deed conveyed only the east half of section thirty-five, and the southwest quarter, and east half of northwest quarter of section nine. *Scholle v. Rosiers et al.*, 328.

DEVISE.

1. Where a testator devised as follows: "In view of the goodness of Almighty God, in blessing me with a competency of this world's goods, and the privileges and advantages of Christianity and the church; and having on a former occasion, conveyed by deed to the board of trustees appointed for that purpose, one acre and a half of land out of the northwest corner (next the school-house lot), of the southwest quarter of section No. three, of township sixty-nine, range nine, for the purpose of laying aside as a grave yard, and upon which a house of worship for the use of the Methodist Episcopal Church,

should be built. Now, for the purpose of further assisting in carrying out the design aforesaid, I give and bequeath to the Methodist Episcopal Church, all the residue of my real estate not above disposed of, or the proceeds thereof, to be used and disposed of, as follows: The trustees above referred to, to wit: (naming five persons) and their successors in office, to take charge of the said devise, bequest, or legacy, and to invest the same in such manner, as will appear to them the most productive and safe, and the proceeds, dividends and interest thereof, to be applied by them and their successors in office, as follows: *Item 1.* Five dollars, to be paid annually to the missionary cause of the Methodist Episcopal Church; *Item 2.* Five dollars, to be paid annually for the support of the preacher or preachers on this circuit, including the premises above named, and which will hereafter be more fully stated; *Item 3.* The balance of the interest or dividend to be applied towards the erecting, finishing, repairing, &c., of the house of worship to be built on the lot above named of one and one-half acres, conveyed to said trustees and their successors in office, for the use of the Methodist Episcopal Church as aforesaid; and if said interest or dividends, or proceeds of the same, shall not be all needed for the use of building, repairing, &c., then the balance to be appropriated towards paying the minister or ministers of the Methodist Episcopal Church, whose circuit, or place of labor, or station, may include the meeting-house intended to be built on the lot above named and conveyed;" and where certain of the heirs of the testator, filed their bill in Chancery, claiming that the devise was void, and passed no title in the land devised to the Methodist Episcopal Church, or the trustees thereof; and praying that the trustees may be enjoined from selling or incumbering the real estate, and that the title of the complainants and other heirs, may be quieted and set at rest; and where the trustees of the Methodist Episcopal Church (one of whom was executor of the said will), answered, setting up the organization of the said church, and its objects and purposes; that the testator was a member of said church, and belonged to the Union Class, on the Winchester Circuit, under the jurisdiction of the Iowa Yearly Conference; that said Union Class purchased the lot specified in said devise; and that since the death of the said testator, the members of said church, composing said Union Class, have been constituted a corporate body under the laws of Iowa, and before the commencement of the suit, had accepted the said devise, &c.; and where the answer was demurred to, which demurrer was overruled by the court; *Held*, 1. That as a portion of the property devised, was intended by the testator to be a perpetual fund, for raising the sums directed to be applied annually, to the support of the missions of the Methodist Episcopal Church, and for the payment of the minister on the Winchester Circuit, so much thereof as might be necessary for these purposes, must be administered by trustees; and the church, being an unincorporated society, could not execute the trust; 2. That what was given for immediate expenditure, in erecting and finishing the church building contemplated by the testator was a good devise to, and might be taken by, the church, in its own name; 3. That if no other direction were given by the will, there could be no valid objections to decreeing the money to be paid to the person who ordinarily receives and keeps the funds of the church, or to its treasurer for the time being; 4. That the legal title to the property devised, vested in the trustees named in the will for the use of the church; and that it was not the intention of the testator, to give a fee simple estate in the lands to the Methodist Episcopal Church. *Johnson et al. v. Mayne et al.*, 180.

2. By an executory devise, a freehold may be made to commence *in futuro*, and no particular estate is necessary to support it; and where the future estate is to arise upon some specific contingency, the fee simple is left to descend to the heir-at-law, until such contingency happens. *Miller v. Chittenden et al.*, 252.

3. The number of contingencies is not material, if they are to happen within the limits allowed by law; and the only question is whether they are to happen within a reasonable time. *Ib.*

4. Where there is a present, immediate devise, there must exist a competent

devisee, and a present capacity to take; but if there exists in the bequest, the least circumstance from which to collect the testator's intention of anything else than an immediate devise, to take effect *in presenti*, then, if confined within legal limits, it is good as an executory devise. *Ib.*

5. Unless a devise to the wife by the husband, either by express words, or by necessary implication, is intended in lieu of dower, the wife will not be compelled to elect which she will take, but is entitled to both. *Clark, Adm'r v. Griffeth, Ex.*, 405.

6. If it is left in doubt whether it was the testator's intention that the wife should take the devise, in addition to her dower, she will not be put to her election. *Ib.*

7. D. D., who died without issue, devised to his wife for life, two hundred and forty-eight acres of land, and twelve hundred dollars, to build her a house and all his household and kitchen furniture, and after other bequests, directed, that at the death of his wife, the real estate devised to her, should go to the minor heirs of J. D. The widow having deceased, an action was brought by her administrator against the executor of the husband, to recover one-half of the assets of the estate of the husband, to which it was alleged the widow was entitled. The executor answered, denying the right of the widow, to one-half of the personal estate, setting up the will of the testator and its probate, and alleging that the widow approved of the provision made by the said will for her support. To this answer, the plaintiff replied, admitting the execution of the will, and averring that the said widow rejected the provision made for her by the will, and claimed her dower; that she relinquished all rights conferred upon her by the will; and that she never, at any time, approved of the provisions of the same, respecting herself. Attached to this replication, were copies of the protest made by the widow to the county court, against the provisions made for her by the will, and of her petition for the assignment of her dower. The replication was demurred to, for the following reasons: 1. That the petition to the county court for dower, was insufficient to show, that the widow elected to take dower, and relinquish her rights under the will; 2. That the protest made to the county court did not amount to a relinquishment by her, of all rights conferred upon her by the will, which demurrer was sustained by the court; *Held*, 1. That there did not appear to be any such inconsistency between the widow's claim for dower, and her right to the estate devised to her by the will, as should necessarily put her to an election between them. *Ib.*

DILIGENCE.

1. To show due diligence in an affidavit for a continuance, it is not sufficient to state generally that such diligence has been used; but the affiant should specify what he has done, that the court may judge of the diligence. *Brady v. Malone*, 146.

2. What is, or is not, due diligence, is to be determined by the court, and not by the affiant. *Ib.*

DOMESTIC ANIMALS.

1. Where in an action of trespass, the court instructed the jury, that "no man has the right to suffer to run at large, animals of a dangerous kind, either to the person or property of another, and if he does, he is responsible for all damages which result from the acts of such animals;" *Held*, That there could be no possible objection to the instruction. *McManus v. Finan*, 283.

2. Where in such an action, the defendant asked the court to charge the jury as follows: "That if the jury believe from the testimony, that the domestic animals of other persons beside those of defendant, were in the habit of trespassing on the premises, at the times set forth in the petition, they cannot

find that the defendant's domestic animals did all the damage to the premises," which instruction the court refused to give; *Held*, That the instruction involved a question of fact, and was properly refused. *Ib*.

3. Where in such an action, the defendant asked the court to instruct the jury as follows: "That the jury must be satisfied from the testimony, what amount of damages the defendant's animals have done, before they can find for the plaintiff," which instruction was refused; *Held*, 1. That the instruction was properly refused. *Ib*.

DOWER.

1. The provisions of the statute which provides for a wife's relinquishment of dower, are a substitute for the fine and common recovery at common law, and must be substantially complied with. *O'Ferrall v. Simplot*, 381.

2. The ordinance of 1787, with subsequent acts, made the law of dower one of the fundamental laws of the territory of Iowa. *Ib*.

3. Where the husband alone conveys real estate, the dower of the wife, upon his death, is to be governed by the law in force at the time of making the conveyance by the husband, and not by that in force at the time of his decease. *Ib*.

4. The statute of Merton, (20 Henry III, A. D. 1236,) which gave a doweress damages for the detention of her dower, was not deprived of any effect by section six of the act of July 30, 1840. *Ib*.

5. Under the act entitled "An act to allow and regulate the action of right," approved December 29, 1838, and under chapter 116 of the Code, damages are recoverable in an action for dower. *Ib*.

6. A doweress is entitled to recover damages for the detention of her dower, from the alienee of her husband, or his grantee, as measured by the use and profits at least, from the time of a demand of dower, provided the demand was not more than six years prior to the commencement of the suit. If the demand was more than six years before the action was commenced, she can only recover for the six years. *Ib*.

7. Where a doweress is entitled to dower in different tracts of land, the courts possess no power to order dower in all the tracts, to be assigned out of one or more parcels, without the consent of the doweress. *Ib*.

8. Unless a devise to the wife by the husband, either by express words, or by necessary implication, is intended in lieu of dower, the wife will not be compelled to elect which she will take, but is entitled to both. *Clark, Adm'r v. Griffith, Ex.*, 405.

9. If it is left in doubt whether it was the testator's intention that the wife should take the devise, in addition to her dower, she will not be put to her election. *Ib*.

10. D. D., who died without issue, devised to his wife for life, two hundred and forty acres of land, and twelve hundred dollars, to build her a house, and all his household and kitchen furniture, and after other bequests, directed that at the death of his wife, the real estate devised to her, should go to the minor heirs of J. D. The widow having deceased, an action was brought by her administrator against the executor of the husband, to recover one-half of the assets of the estate of her husband, to which it was alleged, the widow was entitled. The executor answered, denying the right of the widow, to one-half of the personal estate, setting up the will of the testator and its probate, and alleging that the widow approved of the provision made by the said will for her support. To this answer, the plaintiff replied, admitting the execution of the will, and averring that the said widow rejected the provision made for her by the will, and claimed her dower; that she relinquished all

rights conferred upon her by the will; and that she never, at any time, approved of the provisions of the same, respecting herself. Attached to this replication, were copies of the protest made by the widow to the county court, against the provisions made for her by the will, and of her petition for the assignment of her dower. The replication was demurred to, for the following reasons: 1. That the petition to the county court for dower, was insufficient to show, that the widow elected to take dower, and relinquished her rights under the will; 2. That the protest made to the county court, did not amount to a relinquishment by her, of all rights conferred upon her by the will, which demurrer was sustained by the court. *Held*, 1. That there did not appear to be any such inconsistency between the widow's claim for dower, and her right to the estate devised to her by the will, as should necessarily put her to an election between them; 2. That the court erred in sustaining the demurrer. *Id.*

DUBUQUE.

1. The act entitled "An act to amend an act to incorporate and establish the city of Dubuque," provides for no appeal, or other mode of review, in cases arising under section three of that act. *Ragatz v. The City of Dubuque*, 343.

2. A party aggrieved by the decision of a jury summoned under section three of the act, entitled "An act to amend an act to incorporate and establish the city of Dubuque," may file a petition in the District Court, to enjoin the city of Dubuque, from appropriating a part of his lot, for the purposes of a street, until a just compensation has been ascertained and paid; and the party has a right to have that compensation determined by a competent tribunal. *Id.*

ELECTION.

1. A notice of an election, published on the morning of the day on which the election is to be held, is no notice, in any legal and proper sense. *The State ex rel. Lewis v. Young*, 561.

2. Where an act for the incorporation of a city, provided that the act shall take effect from and after its publication in certain newspapers named therein, and required the trustees of the township in which the city was situate, to cause a vote to be taken on the acceptance of said city charter, in the manner in which township elections are now called and holden, and also fixed the day on which such vote was to be taken, and required such election to be held between the hours of nine and ten, A. M., and four o'clock, P. M. of said day; and where the act was published in one of the papers on the 13th of February, 1857, and in an *extra* of the other paper, on the 16th of February, the day fixed in the act for taking the vote on accepting said charter, and before ten o'clock of said day, about 250 copies of said *extra* were circulated in said city; and where the only notice of said election on the adoption of the charter, was contained in said *extra*, issued on the morning of the election—at which election the said charter was adopted; *Held*, That the act contemplated that the township trustees should direct and fix the manner of calling and holding said election, and that the notice given, complied with neither the letter nor the spirit of the law. *Id.*

EQUITY.

1. Where the complainant filed his bill in Chancery, praying for an injunction to enjoin the respondent from proceeding in an action at law to recover the possession of a certain town lot, claiming title to said lot through one L.; and where the bill alleged, that the complainant was in possession of the lot at the time of the commencement of the action at law, and had been long before the purchase of the lot by the respondent; that in 1845, the lot was sold to L

by the county of Keokuk, who paid a portion of the purchase money, and obtained a bond for a deed; that he subsequently paid the entire consideration, and obtained a deed; that said deed was never recorded, and is now lost; and that L. had gone to parts unknown, the allegations of which petition, were sustained by proof; and where, on the final hearing of the cause, the respondent was perpetually enjoined from further prosecuting his action for the possession of the lot; *Held*, 1. That the complainant had no such complete defence at law, against the action for the possession of the lot, as that a court of equity could not take cognizance of the complainant's bill; 2. That the evidence was sufficient to sustain the decree; 3. That the possession of the complainant was sufficient to put the respondent upon inquiry, before purchasing. *Butch v. Lash*, 215.

2. The meritorious consideration of providing for a child, has always been held sufficient to authorize the enforcement of an executory contract against the party contracting; but where the contest is between one child and other children of the same ancestor, the meritorious consideration operates on both sides, and being equally balanced, equity will not interfere, or lend its aid. *Holland et ux. v. Hensley et al.*, 222.

3. Equity, as well as the law, contemplates that all contracts relating to real estate, shall be evidenced by some writing, signed by the party to be charged; and when it is sought to bring a case within any of the exceptions allowed to avoid the operation of the statute of frauds, the court should never be left to act upon conjecture, or upon proof loose and indeterminate in its character. *Williamson v. Williamson*, 279.

4. P. having a "claim," or "settler's right," on a certain tract of land, on the 13th of August, 1838, by a written agreement sold the same to W. for the consideration of \$1,500. This agreement was filed for record on the 9th of December, 1838, but was never acknowledged. C. and D. having actual notice of said agreement, in March and April, 1839, purchased the interest of W. in the land, and on the 12th of the latter month, P. on the margin of the record where said agreement was recorded, made and signed an entry of satisfaction as follows: "I hereby relinquish all my right, title, interest and claim to the within described property, for value received." The land was entered in the years 1839, 1840 and 1841, by different individuals, and in different parcels. A portion was pre-empted in 1840, by one P. and another, at which time, P. (the complainant) as one of their witnesses, made oath, that he had no interest in said land, and that so far as he knew, there was no other claim thereon, than that set up by the pre-emptors. P. never resided on this land, and at the time of his sale to W. had a claim or claims on a section or more of government land, besides the tract in controversy. The sale to W. was made with the understanding that W. was to hold the claim for P. for an agreed consideration, and P. was to furnish the money to enter the same, and then take the conveyance from W. When P. sold to W., the claim was worth about the sum stipulated in the agreement. Several years since a portion of the land was laid off into lots, as additions to the town of Burlington, since which many valuable improvements have been made on it, and the premises are now worth from \$75,000 to \$100,000. P. has constantly, since 1835, resided near the land, and passed over or near it, during that time, at least once each week. He has also taken title to some of the lots so laid off on said land, from the original proprietors or their grantees, and again contracted to sell the same. W. left the county for parts unknown, soon after his sale to D. and C., insolvent, and until the last five years, P. has set up no right or claim to the premises, under his contract with W.—nor is any reason shown for the delay. On bill filed by P., asking a decree for the land, or that he may have a lien on the same, for the purchase money under the contract with W.; *Held*, That P. was not entitled to relief. *Pierson v. David et al.*, 410.

5. In order to enforce the performance of a parol contract for the sale and conveyance of real estate, the existence of the contract and its terms, must be shown, and that the vendee, either paid a part of the purchase money, or

took possession of the land, under the contract. *Fairbrother v. Shaw et al.*, 570.

6. A mortgagee of real estate, is a purchaser, within the meaning of the recording laws of this state. *Porter et al. v. Green et al.*, 571.

7. Where a bill in Chancery charges material facts, to be within the knowledge, and certain acts to have been done at the instigation of the respondent, and the answer does not respond to such charges, such charges are to be taken as true. *Compton v. Comer*, 577.

ERROR.

1. Where in an action of trespass to personal property, by the vendee against a sheriff and certain creditors of the vendor, the defendants, for the purpose of defeating the sale under which the plaintiff claimed, asked A., a witness called by them, the following question: "While B. M. (under whom the plaintiff claimed), and W. were in possession of the goods, and on or about the first of January, 1854, did they or not, agree to send the goods over the river to Sabula, in Iowa, to be out of the way of their creditors, or the creditors of B.?" to which interrogatory the plaintiff objected, and the court sustained the objection; and where it did not appear from the record, that the question was objected to in the court below, on the ground that it was leading in its character, though that objection was urged in the appellate court; *Held*, 1. That the court erred in sustaining the objection to the interrogatory; 2. That the objection that it was leading was not valid, unless made at the time the question was propounded. *Adams v. Foley et al.*, 44.

2. Where a plaintiff establishes by proof more than is necessary to make out his case, the defendant is not injured, so that he can reasonably complain. *Kelly v. Ford*, 140.

3. Where, in an action on a promissory note brought in the name of the assignee, the defendant pleaded fraud and want of consideration, upon which issue was joined; and where the defendant failed to establish the main branch of his defence, in relation to the fraud and want of consideration; and where the court excluded certain depositions taken by the defendant, which depositions tended to show, that the plaintiff and the payee of the note, subsequent to the assignment thereof, were connected in business transactions similar to that for which the note was given; *Held*, That the defendant was not injured by the exclusion of the depositions. *Id.*

4. A party alleging error to his prejudice must show it. *Brady v. Malone*, 146.

5. Where a defendant, at the first term after the commencement of the suit after his motion to quash the return on the original notice, on the ground of insufficiency, had been overruled, filed his answer, and applied for and obtained a continuance; and where at the second term, the cause was again continued, to afford time to obtain the sworn reply of the plaintiff, called for by the defendant; and where, at the third term, the cause was tried, and judgment rendered against the defendant; and where the defendant, on appeal to the Supreme Court, assigned for error the decision of the court, overruling the motion to quash the return on the original notice; *Held*, That if the defendant had been driven into a trial at the first term, he would have been authorized to raise the question as to the sufficiency of the return, in the appellate court; but that having had, to prepare for trial, more than all the time he would have obtained ordinarily, had the service been held insufficient, the overruling the motion to quash the return, was an error that worked no injury to the appellant, and of which he could not complain in the appellate court. *Converse, Admr. v. Warren*, 158.

6. Where a party clearly brings himself within the law, in applications for
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a change of venue, and no special circumstances are shown, as that prior continuances have been granted, or something of that kind, it is the duty of the court to grant the motion; and a refusal to do so may, and will, be reviewed by the appellate court. *Welsh v. Savary*, 241.

7. Objections not urged in the court below, come too late, when presented for the first time in the appellate court. *Delany v. Reade*, 292.

8. Where in a proceeding before a justice of the peace, under the act "for the suppression of intemperance," approved Jan. 22, 1855, under which certain liquors were seized, the owner of the liquors filed a plea to the jurisdiction of the justice, which was overruled: and where the said owner then moved to dismiss the suit, for the want of jurisdiction, which, having been overruled, he then demanded a trial by a jury of twelve men, which was also overruled, and the said liquors were found to be forfeited by a jury of six men, and judgment rendered upon their verdict, accordingly; and where the judgment of the justice, on appeal, was affirmed in the District Court; *Held*, That there was no error in the proceedings. *Bryan v. The State*, 349.

9. A party cannot successfully urge an error in the proceedings of the court, which worked him no prejudice. *Gilson v. Johnson*, 463.

10. Where a demurrer is waived by the filing of an answer, no errors can be assigned in the appellate court, upon the judgment of the District Court, overruling the demurrer. *Adams v. Peck*, 551.

EVIDENCE.

1. By demurring to the evidence, the demurrant admits the truth of the facts found, and every conclusion in favor of the other party, which the evidence conduces to prove, or which the jury might have inferred from it, in favor of his opponent. *Jones v. Ireland*, 63.

2. The object of a demurrer to evidence, is to obtain the opinion of the court upon the sufficiency of the evidence in law, to maintain the issue in fact. *Ib.*

3. An offer to demur to evidence, is not *stricti juris*. *Ib.*

¶ 4. If there be no colorable cause of demurrer to evidence, the court should not allow it. *Ib.*

5. Before joining in a demurrer to evidence, the plaintiff has the right to require an admission on the record, of the truth of all the facts that the evidence offered by him, tended to prove, or that the jury might infer from it in his favor. *Ib.*

6. Without such an admission upon the record, the plaintiff is not bound to join in the demurrer. *Ib.*

7. And if the plaintiff does join in a demurrer to evidence, without such an admission upon the record, the court can pronounce no judgment on the demurrer. *Ib.*

8. Where a plaintiff establishes by proof, more than is necessary to make out his case, the defendant is not injured, so that he can reasonably complain. *Kelly v. Ford*, 140.

9. Where in an action on a promissory note brought in the name of the assignee, the defendant pleaded fraud and want of consideration, upon which issue was joined; and where the defendant failed to establish the main branch of his defence, in relation to the fraud and want of consideration; and where the court excluded certain depositions taken by the defendant, which depositions tended to show, that the plaintiff and the payee of the note, subsequent to the assignment thereof, were connected in business transactions similar to

that for which the note was given; *Held*, That the defendant was not injured by the exclusion of the depositions. *Ib.*

10. Where, in an action on a promissory note, the defendant objected to the note being offered in evidence, on the ground of variance between that declared on and the one offered—the alleged variance existing in the date of the note; and where, upon the question of variance, the plaintiff called the defendant, and obtained his testimony as to the date of the note; and where the counsel for the defendant, then inquired of the defendant, as to the consideration for the note, and his defence to it, which was objected to by the plaintiff, and the court sustained the objection; *Held*, That the objection was properly sustained. *Converse, Adm'r v. Warren*, 158.

11. A party claiming a conveyance of real estate, who does not allege, and cannot prove, that the land was purchased with his money, cannot be permitted to show, by parol evidence, that the purchase was made for his benefit, or on his account. *Holland et ux. v. Hensley et al.*, 222.

12. No evidence of any contract for the creation or transfer of any interest in real estate, is competent, unless it be in writing, and signed by the party sought to be charged, or his agent. *Ib.*

13. Where in an action against two persons, as surviving members of a copartnership, the defendants, on the trial, offered to permit the plaintiffs to take judgment for the amount of their claims and costs, against one of said defendants, and thereupon claimed the right to read the deposition of such defendant in evidence, for the purpose of proving that the other defendant was not a member of such copartnership, which judgment the plaintiffs refused to receive, and the deposition was rejected; *Held*, That the plaintiff could not refuse to take the judgment, and that the evidence was admissible. *Danforth, Davis & Co. v. Carter & May*, 230.

14. In an action against a copartnership by a creditor, the declarations of the partners, made while the firm was in existence, and before any difficulty arose, are admissible in evidence to show that one of the persons sought to be charged, was not a member of such partnership. *Ib.*

15. Such declarations to be admissible as evidence, must have been made before difficulty arose, whilst the business was going on, and as imparting information to persons with whom the firm dealt, and the world. *Ib.*

16. The admissibility of the declarations of a partner, showing who are members of the firm, does not depend upon the fact that such partner has deceased; but are receivable, upon the ground, that as the plaintiff must recover against all the defendants or none, and as such partner, if called to testify in person, would be testifying *in presenti*, he would be interested to defeat the suit. *Ib.*

17. The testimony of a witness as to whom he gave credit, as members of a copartnership, when selling goods to the firm, is but the opinion of the witness, and is not receivable in evidence. *Ib.*

18. The declarations of a party sought to be charged as a partner, are not admissible to prove that he was not a member of such copartnership. *Ib.*

19. Where no part of the evidence in a cause, is brought before the appellate court, nor anything to show the pertinency of instructions asked and refused that the court cannot determine the applicability of the instructions, or that they were improperly refused. *Welsh v. Savery*, 241.

20. Where in an action to recover for the rent and occupation of a mill, under a lease, the defendant alleging, with other defences, that the plaintiff had brought a former suit against him, on a different cause of action, while the said lease was existing, and in that suit, had sued out a writ of attachment, and attached his cattle, carts, wagons, logs, lumber, and other property and material, by which and for which he carried on the business of the mill

by means of which he was interrupted in the use of the mill, and could not run the same, and so the use and occupation thereof was lost to him for a long space of time—wherefore, and by reason of which, he is not liable for the rent of the mill; and where the plaintiff replied, that the defendant had, (prior to the present suit,) brought an action against the plaintiff, for the wrongful suing out of the said attachment, in which action the said defendant pleaded the same matters which are now pleaded in this action, to wit: the attachment of the said property, by and with which the said mill was carried on, as a ground for the recovery of damages, and that the said matters were permitted to go to the jury, and were heard and tried, in which action the said defendant recovered damages; and where the plaintiff offered in evidence, the record of the proceedings in the action for wrongfully suing out the attachment, to which the defendant objected: 1. Because the former suit was not between the same parties; 2. Because, on the trial of the former action, the court instructed the jury, that the then plaintiff could recover only for damages sustained prior to the commencement of the action, which objection was sustained, and the evidence excluded; *Held*, That the court erred in excluding the evidence. *Davis v. Milburn*, 246.

21. Where a party seeks to divest another of the legal title to real estate, on the ground of a parol gift, upon conditions, which he alleges have been complied with by him, the burden of proof is upon him to sustain the allegations of his petition, when they are denied by the respondent. *Williamson v. Williamson*, 279.

22. In a suit commenced by attachment, where issue is taken on the facts alleged in the petition as a ground for the attachment, the allegations set forth in other petitions for attachments against the same defendants, and in which suits, judgments have been rendered by default, are not admissible in evidence, to prove the facts alleged in such petition. *Sackett, Belcher & Co. v. Partridge & Cook*, 416.

23. Where in an action by the indorsee against the indorsers, on a certificate of deposit, made in Illinois, by the Phoenix Bank of Chicago, one of the defendants answered, averring as follows: "And defendant denies that the plaintiff has any cause of action against him, because he says said supposed contract was made and entered into in the state of Illinois, and not in the state of Iowa. And defendant denies that plaintiff has exhausted his remedy against the maker of said certificate;" and where, on the trial, the defendant offered in evidence, a printed copy of the statute of Illinois, for the purpose of showing that, under said law, it was the duty of plaintiff to attempt to collect said demand from the maker, by the institution of legal proceedings, or that such proceedings, in consequence of the maker's insolvency, would have been unavailing, which evidence was objected to by the plaintiff, but the objection was overruled, and the evidence admitted; and where the court instructed the jury, that "it devolved on the plaintiff to show affirmatively, that he had complied with the law of Illinois, and exhausted his remedy against the makers of said certificate, and there being no allegation nor proof of the institution of a suit against the maker, nor of the insolvency of the Phoenix Bank, they should find for the defendant;" *Held*, That the evidence was improperly admitted, and that the instructions were erroneous. *Bean v. Briggs & Felt-houser*, 464.

24. Where on the trial of an indictment for an assault, it was shown by the testimony of H., the person assaulted, that he went with, and at the request of a constable, to the house of the defendant, to levy an execution on his property; that they went to the stable, and the constable opened the door, went in, and levied on two mules; that H. went into the stable with him; and that while there the assault was committed; and where the defendant, on cross-examination, asked H. whether, when the constable attempted to take the mules from the stable, the defendant did not claim, that they were his plow team, and as such, exempt from execution, and whether he did not offer to the constable other property to levy upon, sufficient to satisfy the execution?

to which an objection was sustained by the court; *Held*, That the evidence was properly excluded from the jury. *Cokely v. The State*, 477.

25. And where on the further cross-examination of H., he was asked, whether the wife of defendant did not request the constable and H. not to levy on the mules, but to levy on other property, which the witness answered, stating that his wife opposed the levy on the mules, but did not tell them that they might levy on other property, and made no request to that effect; and where the defendant then introduced his wife as a witness, and offered to prove by her, that she had made such request, to which an objection was sustained; *Held*, that the ruling of the court was correct. *Ib.*

26. Where on the trial of an indictment for an assault, after the state had proven that the party assaulted went to the house of defendant, to assist a constable in levying an execution on his property, the defendant offered to prove that the property levied on was exempt from execution, and that he requested them to levy on other property, which evidence was excluded from the jury; *Held*, That the evidence was properly excluded. *Ib.*

27. And where, in such a case, after the defendant had asked the prosecuting witness on cross-examination, whether he struck the wife of defendant and used abusive language to her, the defendant proposed to show by his wife that said witness had used abusive language to, and struck her, which evidence was intended to impeach the witness; and where the court held, that the wife might state whether said witness struck her, but should testify not as to the abusive language; *Held*, That the ruling of the court was correct. *Ib.*

28. In proceedings under a creditor's bill, to reach real estate alleged to have been fraudulently conveyed, neither the answer of the grantor, in a chancery suit, nor his oral declarations made, nor letters subsequent to the conveyance, are receivable in evidence to affect the title of the grantee, without evidence that the grantee colluded with the grantor, with a fraudulent intent. *De France v. Howard et al.*, 524.

29. And the declarations of the grantor, made after such conveyance, are not receivable in evidence to show such collusion. *Ib.*

EXECUTION.

1. Where a judgment is obtained against a corporation, and an order is obtained that execution be levied on the individual property of the members thereof, the execution should follow the judgment, and run against the corporation, with a clause that it be levied on the property of the members. *Hampson et al. v. Weare et al.*, 13.

EXEMPTION.

1. When an execution defendant shall use a particular building as a home, the whole of such building, in case of controversy and disagreement, will be presumed to constitute, and be a part of, the homestead, until it is shown by the party adversely interested, that some specific portion is not of the homestead character, and therefore not exempt. *Rhodes, Pegram & Co. v. McCormick*, 368.

2. If under the same roof with the homestead as defined by statute, there shall be a floor or floors, room or rooms, which are not used by the family as a home, they are no more exempt from execution, than if under another roof, or on another and different portion of the lot. *Ib.*

3. It was not the intention of the law-making power, to exempt from execution an entire building or house, for whatever used, because some portion of it is used by the owner as his homestead. *Ib.*

4. And if a portion of a building shall come within this definition, and a portion not, then a portion may be exempt and the other not. *Id.*

5. Where an execution under a judgment rendered in 1856, was levied on a certain half lot in the city of M., thirty feet wide by one hundred and forty feet deep, on which the defendant had erected a three story building, thirty feet wide, and sixty feet deep, which the defendant claimed to be his homestead, and exempt from execution; and where referees were appointed by the sheriff, who reported to the District Court, that the building was erected by the defendant in 1850; that the lower stories were occupied by him as a place of business, until the year previous to November 10, 1856; that at the time of making said report, the lower story and cellar, and first floor of said building, were rented to one N. as a store, and occupied by him; that the premises were of the value of about eight thousand dollars; that the defendant finished the upper stories in part, and moved into them in December, 1852, and has continued to occupy the same as a dwelling from that time; that each upper story has five rooms finished, suitably for a dwelling; that for one year after the house was finished, one of the rooms on the second floor, was occupied and used as a physician's office; that for two years, another room on the same floor, was occupied and used as an attorney's office; that still a third room was occupied for about twenty-one months, by certain attorneys and bankers; that the third room was all in one room until 1854, and for one year immediately after the erection of the house, was occupied and used as a printing office; that the yearly rent of the cellar and first floor is eight hundred dollars; that the second and third stories are occupied by said defendant and family, and one C. and family, and are worth three hundred dollars per year; that there are no other buildings on said lot; that the premises have never been selected, marked out and platted as a homestead; that in 1851 and 1855, the defendant (his wife not joining therein), executed two several mortgages on said premises; and that in their opinion, said building was originally designed as follows: The cellar and first floor for a business house, and the second and third floors for a family residence as now occupied; *Held*, That the cellar and first floor of the building, were liable to be seized on execution, and that the second and third stories were exempt from execution, as the homestead of the defendant. *Id.*

FEME SOLE.

1. Where a wife is deserted by the husband, and she continues to live apart from him, and is dependent upon herself for a support, she may sue and be sued as a *feme sola*. *Smith v. Silence*, 321.

2. Where in an action for slander, it appeared that the plaintiff was a married woman; that about fifteen years before, the husband of plaintiff left her, and went to New Orleans to reside; that he wrote to his wife for two years and a half after he left, about which time she was induced to believe that he had died in New Orleans of yellow fever; that she remained in this belief until the autumn of 1854, when the husband wrote to his father, in New York, from Havana, in Cuba, inquiring about his family; that he also wrote to his wife, and requested her to come to Havana, and live with him; that in March, 1855, plaintiff went to Havana, and went to the house of her husband; that from what she saw and heard of him, when she arrived, she refused to live with him, and returned to the United States, as soon as she was able to leave the island of Cuba; and that the husband had accumulated property in Havana; *Held*, That the desertion and continued abandonment of the wife by her husband was sufficient authority for her to sue in her own name; and that she had such right to sue, without first obtaining authority from the District Court, under chapter 84 of the Code. *Id.*

3. The remedy provided by sections 1456, 1457 and 1458 of the Code, in relation to married women abandoned by their husbands, is cumulative, and is more particularly applicable to cases, where the abandonment is not such as

to imply a total renunciation of marital rights, or where there appears to be no intention of leaving the wife free to act as a *feme sole*. *Id.*

FENCE.

1. Where in an action of trespass, charging the cattle of the defendant with breaking into the plaintiff's close and destroying his crops, the court, after defining a lawful fence, instructed the jury, that whether the fence was a lawful fence, and a good one, was in the *discretion* of the jury; *Held*, That the word *discretion*, in its proper sense, implies judgment; and that used in this sense, the instruction was correct. *McManus v. Finan*, 283.

FORCIBLE ENTRY AND DETAINER.

1. Where in action of forcible entry and detainer, the plaintiff, for the purpose of establishing actual possession of the premises, proved that in the spring of 1854, he had the premises, which were uninclosed, surveyed, and a map made; that at the same time, stakes were set at the corners, and the trees blazed on the boundary lines; that a portion of the ground was also subdivided and laid off into smaller lots; that stakes were set up at the corners of respective lots, rendering the boundaries visible, in the usual way of laying out town lots; that a street was also made through the adjoining land of the plaintiff, which was graded so as to extend some five or seven feet on the premises in dispute; that the trees and under brush growing on the premises where the street was opened, were cut off and hauled away by the plaintiff; that the plaintiff claimed to own some of the adjoining lots; and that he had sold lots adjoining the premises in dispute, to different persons; and where the court instructed the jury, that *actual possession* of real estate may be shown by any act of possession, as where the owner goes upon the land to take possession, or to exercise any other act of ownership; and if they believed that the plaintiff exercised over the premises those acts of ownership usually exercised by owners over land on which they do not actually reside, they might infer *actual possession*; and that it was not necessary to such *actual possession*, that the premises should be surrounded by a fence, or built upon; and where the jury found that the plaintiff was in the *actual possession* of the premises, which verdict the court refused to set aside on motion; *Held*, That the instruction was correct, and that there was sufficient evidence to justify the jury in finding that the plaintiff had actual possession of the premises at the time of the entry by the defendants. *Langworthy v. Myers et al.*, 18.

2. Where in an action of forcible entry and detainer, the court instructed the jury as follows: "1. That if the jury believe that there were indications upon the ground in dispute, at the time defendants took possession, of its being controlled and actually possessed by some other person, it was sufficient to put defendants upon inquiry, and they had no right to take possession of the land while it seemed to be in the possession of another person. 3. If the jury believe that defendants took possession secretly, and in such way as to avoid observation, they are authorized to believe that defendants meant to acquire an undue advantage, by which they ought not to be benefited. 8. That if the jury believe that defendants procured a surveyor to run out said lots, under an injunction of secrecy; that they on the same day followed close on the heels of the surveyor, with loads of boards and posts; that they commenced the construction of a hasty unsubstantial fence, on the side most out of view from the city; that they built and finished such fence in the utmost haste; that they put up in the same manner, a shanty of boards upon the lot, out of sight among the trees; that these improvements were made with the utmost secrecy and expedition, the jury are authorized hence to infer that the entry of defendants upon said premises, was by fraud and stealth." *Held*, That the instructions were legal and proper. *Id.*

FORECLOSURE.

1. Where in an action on a promissory note, for the sum of \$10,000, dated in November, 1848, one-half payable in one year, and the other half in two years, from the date thereof, which action was brought, to recover the last payment, it appeared that the defendant, to secure the payment of said note, executed a mortgage on several parcels of real estate, situate in the state of New Hampshire; that the defendant having failed to pay the amount first due on said note and mortgage, the plaintiff, in March, 1850, commenced proceedings under the laws of New Hampshire, to foreclose the defendant's equity of redemption in said lands; that in September, 1850, a decree was rendered, that plaintiff should be put into possession of the lands mortgaged, and a conditional judgment against the defendant, for the amount of the first payment and interest; under which the plaintiff received possession of a portion of the lands, on the 15th day of March, 1851, the defendant having the right to redeem within one year; and that at the time of the execution of said mortgage, said lands were incumbered to a large amount, by mortgages to other persons; which the plaintiff was compelled to pay; and where the court instructed the jury, that the suit did not open up the foreclosure, and that in making up their verdict, they should ascertain the amount due upon the mortgage, on the 15th of March, 1852,—then ascertain the amount of the incumbrances—add these two amounts together—and from this deduct the value on that day, of the two tracts of land, of which the plaintiff received possession, and credit the mortgage with the remainder—and that the balance due, after such credit, with interest from that date, would be the amount of their verdict; *Held*, That there was no error in the instruction. *Wilson v. Wilson*, 309.

2. Where a mortgage is foreclosed, for an installment then due; and a subsequent suit is brought to recover a second installment, such second suit does not open the foreclosure; nor is the amount found to be due and owing in such case, open to investigation in the second suit. *Id.*

3. Where a party under a foreclosure, takes possession of the mortgaged premises, instead of selling them, he should only be held for the value of the premises entered upon; and the defendant is entitled to a credit on the mortgage, *pro tanto*. *Id.*

FREEHOLD.

1. By an executory devise, a freehold may be made to commence *in futuro* and no particular estate is necessary to support it; and where the future estate is to arise upon some specific contingency, the fee simple is left to descend to the heir at law, until such contingency happens. *Miller v. Okillenden et al.*, 252.

2. The number of contingencies is not material, if they are to happen within the limits allowed by law; and the only question is, whether they are to happen within a reasonable time. *Id.*

GARNISHEE.

1. A municipal corporation may be summoned as garnishee, under the statute of Iowa, and the indebtedness of such corporation to the party defendant, held to respond to the judgment of the plaintiff. *Wales & Son v. The City of Muscatine, Garnishee*, 302.

2. Where a party is garnished as a debtor of the original defendant, and answers, confessing an indebtedness, the original defendant may make any objection to judgment being rendered against the garnishee, which goes to show that the indebtedness is exempt from execution or attachment, or that the judgment is satisfied, or any other defence of a like nature; but he cannot in-

terpose the objection to a judgment against the garnished, that the garnishee is not liable to the process of garnishment. *Ib.*

3. The objection that a party garnished, is exempt from the process of garnishment, is a privilege which the garnishees *alone* can assert. *Ib.*

4. Where the plaintiffs issued execution on a judgment in their favor against B. and the sheriff summoned as garnishees, P., mayor, and J., recorder of the city of M., who, at the ensuing term of the District Court, appeared and answered the interrogatories propounded, from which it appeared, that the city of M. was indebted to B. in a sum certain, for work done on the steamboat landing; and where the plaintiffs moved for judgment against the city of M. for the sum shown to be due B., which motion was objected to by B. and overruled by the court, for the reason that a municipal corporation could not be held as garnishee; *Held*, 1. That B. had no right to make any such objection to the rendition of judgment against the garnishee; 2. That the court erred in overruling the motion for judgment against the city of M. *Ib.*

GRANT.

1. A reservation or exception repugnant to the grant, is void. *Haight v. The City of Keokuk*, 199.

2. The grant to the Sac and Fox tribe of Indians by the United States, of certain lands, by the act of Congress, of June 30, 1834, was to said Indians as individuals, and is to be construed like any other grant or sale to individuals. *Ib.*

3. Where lands are granted to individuals, for the use of a church, which at the time of the grant is not incorporated as such, the persons to whom the grant is made, stand seized to the use, and when the church receives legal capacity to take and hold the real estate, the statute executes the possession to the use, and the estate vests. *Miller v. Chittenden et al.*, 252.

GUARDIAN AND WARD.

1. A person appointed guardian of a minor, having no father, under the act entitled "An act concerning minors, orphans and guardians," approved January 25, 1839, became guardian of the property, as well as of the person, of the ward. *Wade v. Carpenter et al.*, 361.

2. Proceedings by the guardian to sell the real estate of the ward, under the act of January 25, 1839, did not abate by the resignation of the guardian. *Ib.*

3. Where a guardian of the person and property of the minor, filed a petition in the county court, to sell the real estate of the ward, and before a hearing upon the petition, resigned; and where, upon the appointment of another guardian, the proceedings to sell the real estate were carried on without filing a new petition, or serving a new notice upon the ward, and a license to sell was granted to the new guardian, as successor of the one in whose name the proceedings were commenced; *Held*, That the proceeding for license to sell, did not abate, by reason of the resignation of the first guardian; and that the license was properly granted to the second guardian. *Ib.*

4. Where in a proceeding in Chancery to set aside a guardian's sale of real estate, it was alleged that the ward never had any legal notice of the application to sell the real estate; and where it appeared from the record of the county court, which granted the license to sell, that it had been "proved to the satisfaction of that court, that notice, according to law, had been given" of the hearing of said petition to sell said real estate; *Held*, That the decision of the county court on the sufficiency of the service of notice, could not be examined into collaterally. *Ib.*

5. The approval by the county court of a sale of a minor's real estate by

his guardian, as required by section 1506 of the Code, in order to make the sale valid, is not a mere formality. *Ib.*

6. A deed takes effect from delivery; and a guardian's deed cannot be delivered until after it is approved by the county court. Such approval, is an affirmation, not merely of the deed, but of the sale. *Ib.*

HOMESTEAD.

1. When an execution defendant shall use a particular building as a home, the *whole* of such building, in case of controversy and disagreement, will be presumed to constitute, and be a part of the homestead, until it is shown by the party adversely interested, that some specific portion is *not* of the homestead character, and therefore not exempt. *Rhodes, Pegram & Co. v. McCormick*, 368. ✓

2. If under the same roof with the homestead as defined by statute, there shall be a floor or floors, room or rooms, which are *not* used by the family as a home, they are no more exempt from execution, than if under another roof, or on another and different portion of the lot. *Ib.*

3. It was not the intention of the law-making power, to exempt from execution an *entire* building or house, for *whatever* used, because some portion of it is used by the owner as his homestead. *Ib.*

4. So long as the building shall come within the meaning of a homestead, as defined by the Code, the value of it is not limited, though the extent of the ground is; but when not within this definition, it is liable, whatever its value. *Ib.*

5. And if a portion of a building shall come within this definition, and a portion not, then a portion may be exempt, and the other not. *Ib.*

6. The object of the law is to protect the *home*, and preserve it for the family, and not shops, stores, rooms, hotels, and office rooms, which are rented and occupied by other persons. *Ib.*

7. Where an execution under a judgment rendered in 1856, was levied on a certain half lot in the city of M., thirty feet wide by one hundred and forty feet deep, on which the defendant had erected a three story building, thirty feet wide, and sixty feet deep, which the defendant claimed to be his homestead, and exempt from execution; and where referees were appointed by the sheriff, who reported to the District Court, that the building was erected by the defendant in 1850; that the lower stories were occupied by him as a place of business, until the year previous to November 10, 1856; that at the time of making said report, the lower story and cellar, and first floor of said building, were rented to one N. as a store, and occupied by him; that the premises were of the value of about eight thousand dollars; that the defendant finished the upper stories in part, and moved into them in December, 1852, and has continued to occupy the same as a dwelling from that time; that each upper story has five rooms finished, suitably for a dwelling; that for one year after the house was finished, one of the rooms on the second floor was occupied and used as a physician's office; that for two years, another room on the same floor, was occupied and used as an attorney's office; that still a third room was occupied for about twenty-one months, by certain attorneys and bankers; that the third story was all in one room until 1854, and for one year immediately after the erection of the house, was occupied and used as a printing office; that the yearly rent of the cellar and first floor is eight hundred dollars; that the second and third stories are occupied by said defendant and family, and one C. and family, and are worth three hundred dollars per year; that there are no other buildings on said lot; that the premises have never been selected, marked out, and platted as a homestead; that in 1851 and 1855, the defendant (his wife not joining therein), executed two several mortgages on said premises; and that in their opinion said building was originally designed as follows: The

cellar and first floor for a business house, and the second and third floors for a family residence, as now occupied; *Held*, That the cellar and first floor of the building were liable to be seized on execution, and that the second and third stories were exempt from execution, as the homestead of the defendant. *Ib.*

HUSBAND AND WIFE.

1. Where a wife is deserted by the husband, and she continues to live apart from him, and is dependent upon herself for a support, she may sue and be sued as a *feme sole*. *Smith v. Silence*, 321.

2. Where in an action for slander, it appeared that the plaintiff was a married woman; that about fifteen years before, the husband of plaintiff left her and went to New Orleans to reside; that he wrote to his wife for two years and a half after he left, about which time she was induced to believe that he had died in New Orleans of yellow fever; that she remained in this belief until the autumn of 1854, when the husband wrote to his father, in New York, from Havana, in Cuba, inquiring about his family; that he also wrote to his wife and requested her to come to Havana, and live with him; that in March, 1855, plaintiff went to Havana, and went to the house of her husband; that from what she saw and heard of him when she arrived, she refused to live with him, and returned to the United States, as soon as she was able to leave the island of Cuba; and that the husband had accumulated property in Havana; *Held*, That the desertion and continued abandonment of the wife by her husband was sufficient authority for her to sue in her own name; and that she had such right to sue, without first obtaining authority from the District Court, under chapter 84 of the Code. *Ib.*

3. The remedy provided by sections 1456, 1457 and 1458 of the Code, in relation to married women abandoned by their husbands, is cumulative, and is more particularly applicable to cases, where the abandonment is not such as to imply a total renunciation of marital rights, or where there appears to be no intention of leaving the wife free to act as a *feme sole*. *Ib.*

4. Section 1410 of the Code, in relation to the rights of the wife in the estate of a husband dying without issue, is intended to refer primarily to the estate of a person who dies intestate, without issue. *Clark, Admr. v. Griffith, Ex.*, 405.

5. Where the husband dies without issue, and the estate, or part of it, is disposed of by will, the widow is not entitled to one-half of the estate. *Ib.*

6. The husband, though dying without issue, may, by his will, deprive his wife of all interest in his estate, except her dower, as allowed by law. *Ib.*

7. At common law, for an injury to the person of the wife, during coverture, by battery, or to her character, by slander, or for any such injury, the wife must join with the husband in the suit. *McKinney v. The Western Stage Co.*, 420.

8. But where the injury is such that the husband receives a separate loss or damage, as if, in consequence of the battery, he has been deprived of her society, or been put to expense, he may bring a separate action in his own name. *Ib.*

9. This rule of the common law upon this subject has not been changed by the Code. *Ib.*

10. A proceeding by a wife against the husband, under section 1485 of the Code, asking for a change or modification of a former decree, making an allowance for the support of the wife, abates by the death of the husband. (*STOCKTON, J., dissenting.*) *O'Hagan v. Ex. O'Hagan*, 509.

11. Where a wife obtained a decree of divorce against the husband, in which the husband was required to pay her a certain sum, "in full, as alimony;" and where the wife subsequently filed her bill, asking that the former

decree, so far as it related to alimony, might be changed, so as to give her a further monthly allowance for the support of herself and children, during the pendency of which bill the husband died; and where the executor of the husband was made a party respondent, and insisted that the proceeding abated on the death of the husband, and the court dismissed the bill of the complainant; *Held*, That the bill was properly dismissed. *Ib.*

INDICTMENT.

1. Time is sufficiently alleged in an indictment, by an allegation that the offence was committed "on or about" a day therein named. *Cokely v. The State*, 477.

2. An indictment is not double, because an assault is described with additional incidents of aggravation. *Ib.*

3. Where an indictment charged that the defendant, "on or about the 9th day of June, 1856," "committed an assault and battery upon the person of H. with intent to inflict on the person of H. a great bodily injury;" *Held*, 1. That time was sufficiently alleged in the indictment; 2. That the indictment did not charge two distinct offences. *Ib.*

4. An indictment which charges that the defendant "willfully obstructed the public road (describing it) contrary to law," sufficiently avers that the act charged was unlawfully done. *Capps v. The State*, 502.

5. Where an indictment for obstructing a public road described the road as follows: "The public road or highway leading from Fort Dodge to Fort Des Moines, Iowa, on the east side of the Des Moines river, lying and being in Boone township, Boone county, Iowa;" *Held*, That the road was sufficiently described in the indictment. *Ib.*

6. Where it appeared from the transcript of a record in a criminal case, that the indictment had been presented in open court, by the foreman, in the presence of the grand jury; that the defendant appeared by counsel, and pleaded not guilty; and that there was a trial; and where it did not appear that the indictment was indorsed a true bill, nor that it was marked filed by the clerk; *Held*, That the defendant, by pleading and going to trial, waived the objection to the indictment. *Hughes v. The State*, 534.

INFORMATION.

1. An information that follows the statute in every essential requisite is sufficient. *Devine v. The State*, 443.

2. Where the caption and a part of the first count of an information read as follows: "*The State of Iowa v. John Devine*. Before William C. Smith, Justice of the Peace, in and for the county of Benton: The defendant is accused of the crime of selling intoxicating liquors contrary to law. 1. For that the defendant, on the 28th day of January, A. D. 1857, by himself for himself; in Vinton, county and state aforesaid;" and where the sixth count (on which defendant was convicted) averred, "that said defendant on the 29th day of January, A. D. 1857, at the place aforesaid," &c.; *Held*, That the venue was sufficiently laid in the information. *Ib.*

3. Where an information was subscribed and sworn to as follows: "The state of Iowa, Benton county:—I, James L. Pauly, being duly sworn, depose and say, that I believe the matters and things set forth in the above and foregoing information are true," which was signed by the deponent, and to which the jurat of a justice of the peace was attached; *Held*, That the information was properly subscribed and sworn to. *Ib.*

INJUNCTION.

1. Where in a proceeding for an injunction, it appeared that W. obtained a

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judgment in the District Court, against a corporation organized which execution issued, which was returned, "no corporate found, sufficient to satisfy the same;" that notice was served on the defendant and several of the directors of the company, to show cause why the individual property of the members should not be made liable, and where the writs were had, that the court rendered judgment that an execution should issue against the property of the members; that an execution issued to sustain individuals, as members of the corporation, naming them, was dissolved by the District Court; and, where the reasons for the application for the injunction, were as follows: 1. That the property of the members of the corporation was exempt; 2. That to render the stockholders liable, should have been conducted under the act of 1847; 3. That the court could not render the stockholders liable for more than the amount of their stock; and 4. That the stockholders were liable, even to the company, only on certain conditions; *Held*, 1. That the grounds stated in the application for the injunction, were quite sufficient to determine, before it ordered execution to issue against the property of the stockholders, and its judgment upon them was not appealed from; 2. That the execution issued against the stockholders was irregular, and was properly stayed by the injunction; 3. That the court was not in dissolving the injunction. *Hampson et al. v. Weare et al.*, 13.

2. Where the complainant filed his bill in Chancery, praying that he be enjoined from proceeding in an action at law for the possession of a certain town lot, claiming title to said lot, and where the bill alleged, that the complainant was in possession of the lot at the time of the commencement of the action at law, and had bought the lot by the purchase of the respondent; that in 1845, the lot was sold by the county of Keokuk, who paid a portion of the purchase money, and obtained a deed; that he subsequently paid the entire purchase money, and obtained a deed; that said deed was never recorded, and is now lost; and that L. had gone to parts unknown, the allegations of which were sustained by proof; and where, on the final hearing of the cause, the court was perpetually enjoined from further prosecuting his action at law for the possession of the lot; *Held*, 1. That the complainant had no such cause of action at law, against the action for the possession of the lot, as that a writ of injunction could not take cognizance of the complainant's bill; 2. That the court was sufficient to sustain the decree; 3. That the possession of the lot was sufficient to put the respondent upon inquiry, before purchasing the lot. *Lash*, 215.

3. A party aggrieved by the decision of a jury summoned under the act, entitled "An act to amend an act to incorporate the city of Dubuque," may file a petition in the District Court for the city of Dubuque, from appropriating a part of his lot, for the street, until a just compensation has been ascertained and a party has a right to have that compensation determined by a tribunal. *Ragatz v. The City of Dubuque*, 343.

INSTRUCTIONS.

1. Where certain instructions in writing were asked by the defendant, and the court, when the jury was about to retire, handed them to the jury for reading, with the information that they were given as asked, and were read without objection; and where the defendant moved to set aside the verdict, for the reason among others that the court did not give the instructions, nor read them to the jury, which motion was overruled; That the objection to the manner of giving the instructions was not a ground for setting aside the verdict, and that in the absence of objection, it must be presumed that the jury acted by consent. *Langworthy v. Myers et al.*, 18.

2. Either party is entitled to have the instructions read to the jury before they retire, and such is the better practice; but if neither party require it to be done, and suffer them to be handed to the jury, supposing that they would be read by the jury, it is too late after the verdict is rendered to assign the same for error, or make the failure to read the instructions to the jury, the ground of a motion to set aside the verdict and grant a new trial. *Ib.*

3. A cause will not be reversed on account of an erroneous instruction, which could work no prejudice to the party complaining. *Adams v. Foley et al.*, 44.

4. Where, in an action for the forcible detention of real estate, commenced and tried before a justice of the peace, and taken by appeal to the District Court, and in which action the defendant answered "not guilty," the jury in the District Court were instructed that every material allegation in the petition, not specifically denied by the answer, should be taken as true; *Held*, That the instruction, as an abstract proposition, was correct; but that the effect of it was to submit to the jury a question that should have been determined by the court. *McKinney v. Hartman*, 154.

5. And where in such a case, the defendant asked the court to instruct the jury, "that a plea of not guilty was a sufficient denial of the plaintiff's petition, and was sufficient to put the plaintiff upon proof of every material allegation set up in his petition," which instruction the court refused to give; *Held*, That under the circumstances of the case—the record showing there had been a trial before the justice of the peace, and the objection to the sufficiency of the answer being made for the first time in the District Court, after the testimony was submitted to the jury—the instruction should have been given. *Ib.*

6. Where no part of the evidence in a cause is brought before the appellate court, nor anything to show the pertinency of instructions asked and refused, that court cannot determine the applicability of the instructions, or that they were improperly refused. *Welsh v. Savery*, 241.

7. If a party, without objection, permits the instructions of the court to be handed to the jury in writing, without having been read to them, it is too late after verdict to make the objection that the instructions were not read to the jury. *Tally v. Lusk*, 469.

8. A party may insist on having the instructions read to the jury before they retire to consider of their verdict, and if the court refuse him this right, he may take his exception. *Ib.*

9. It is the duty of a party to ascertain at the proper time what instructions are given or refused, and to take his exceptions accordingly. *Ib.*

10. After verdict it is too late for a party to object that he did not know what instructions were given, that they were not read over to the jury. *Ib.*

11. Where a party is dissatisfied with the instructions given, or where the court refuses to give instructions asked for by him, he must except at the time of giving and refusing such instructions. *Ib.*

12. Where a party fails to take his exceptions to the ruling of the court, in refusing instructions, at the time of such refusal, it is too late to do so after verdict. *McKell v. Wright, Evans & Co.*, 504.

13. Where a party fails to except to the ruling of the court, in refusing instructions at the time of such refusal, the appellate court will not inquire whether the instructions were improperly refused. *Ib.*

14. Where in an action by the indorsee of a promissory note, against the maker and indorser, the court instructed the jury, "that if they found the indorser was released, by want of notice of non-payment, still, if they also found that he subsequently *promised* to pay the note, he could be held liable;" and where it was insisted in the Supreme Court, that the instruction should have been qualified, by informing the jury that such promise, in order to bind the

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indorser, must have been made with the knowledge that he had and where there was nothing in the record to show that such was asked or insisted on at the trial; *Held*, 1. That while the instruction have more fully stated the law, with the qualification insisted giving the word *promise* its proper legal signification, there was probability that the jury was misled by the instruction, to the appellant; 2. That the party having failed to ask for a qualification of the court below could not make the error in the ground of complaint in the appellate court. *Aull v. Sloan*, 508.

15. Where in an action of replevin, the plaintiff asked the jury as follows: "1. That it is not necessary in replevin the should prove that he is the rightful owner of the property re had the peaceable possession, his right of possession was good person but the real owner, or some one having a better right. 2. That if the plaintiff had possession of the property, his right is good against all persons, until a better right is proved by some which instructions the court refused to give; *Held*, That the court refusing to give the instructions. *McCoy v. Cadle*, 557.

INTENTION.

1. In the construction of a will, the intention of the testator is to be ascertained; and in ascertaining that intention, the whole contents of the will are to be taken together. *Johnson et al. v. Mayne et al.*, 180.

2. For the purpose of carrying into effect the intent of the testator, the will sanction any mode pointed out by him, consistent with the law. The intent will not be set aside, because it cannot take effect as the testator intended, but it will be allowed to work as far as it can. *Chittenden et al.*, 252.

3. Courts are acting judicially, as long as they effectuate the intent of the donor. *Ib.*

INTOXICATING LIQUORS.

1. The owning of intoxicating liquors in this state, in a state of peace, is not unlawful; nor are such liquors a nuisance, which can be abated, by destroying them. *Bowen & King v. Hale*, 430.

2. A contract for the transportation of intoxicating liquors, is not void under the act for the suppression of intemperance, approved 1855. *Ib.*

3. Where a party was sued as a common carrier, for so negligently performing his contract to carry a demijohn, containing brandy, from B. to O., that the same was lost and destroyed, the defendant, in his answer, denied the contract, and averred it void; that plaintiffs sent a letter, by his teamster, for some article, but did not know what they were; and that if the plaintiffs sent his teamster, he is not liable; *Held*, 1. That the answer amounts to a general issue; 2. That the answer set up no fact, making it void. *Ib.*

4. When the law speaks of selling intoxicating liquors, directly, or on any pretence, or by any device, it is only designed to prevent methods of committing the same offence; and it is not necessary that the information should state in what method the selling was accomplished. *vine v. The State*, 443.

5. Whether the person charged, has sold intoxicating liquors, directly, or by whatsoever pretence or device, it is still the same offence, the law in no sense treats the different means made use of to be constituting a different offence, nor yet as a different species of offence. *Ib.*

6. Where an information charged that "the defendant did, by himself, for himself, sell intoxicating liquor, viz: whiskey," &c.; *Held*, That the offence was sufficiently charged in the information. *Ib*.

7. Where in a prosecution for selling intoxicating liquor, the defendant asked the prosecuting witness, on cross-examination, the following question: "State whether you went to the defendant, when you bought the bottle of liquor, to which you testify in your examination in chief, for the purpose of procuring evidence against him for selling intoxicating liquor?" which was objected to, and the objection sustained; *Held*, That the objection was properly sustained. *Ib*.

JUDGMENT.

1. A *scire facias* is the proper mode of proceeding to revive a judgment, and must be brought in the county where the judgment was obtained. *Carnes v. Crandall*, 151.

2. Where a party seeks to revive a judgment against the administrator of a deceased party, and to make the heir of such deceased person, a party to the proceedings, so as to obtain execution against the real estate of the defendant in the judgment, it is not necessary that the proceedings should be separate. *Ib*.

3. Section 1367 of the Code, in relation to unsatisfied judgments rendered prior to the death of the decedent, does not apply to cases where a judgment plaintiff is seeking to subject real estate to the satisfaction of his judgment. It applies only, where the party is seeking satisfaction from the personalty. *Ib*.

4. Where judgment was obtained against C., on the 3d day of September, 1851, in the District Court of Marion county; and where, on the 29th day of November, 1851, a transcript of this judgment was filed in the office of the clerk of the District Court in Mahaska, the said C. being at the time the owner of certain real estate, situate in that county; and where the said C. died subsequent to the rendition of the judgment, and the filing of the transcript in Mahaska county; and where the plaintiff in the judgment, on the 11th day of April, 1856, filed his petition on the chancery side of the District Court of Mahaska county, against the administrator and heir at law of the said C., praying that a decree may be rendered, declaring said judgment a lien upon the land situate in Mahaska county; that the judgment may be revived; and that the land may be sold; and where the petition was demurred to on the following grounds: 1. That the plaintiff had a full and adequate remedy at law. 2. That a dormant judgment at law cannot be revived in Chancery. 3. That the claim is cognizable only in the county court. 4. That the claim was barred by section 1373 of the Code, which demurrer was sustained by the court; *Held*, That the claim was not barred by section 1373 of the Code. 2. That the demurrer was properly sustained. *Ib*.

5. Where in a proceeding to enjoin the city of Keokuk from prosecuting an action against one L., for refusing to pay wharfage for landing at said city, as required by an ordinance of said city, the complainant claimed to be owner of lot six, in block six, in said city, and of the wharf where such landing was effected, and alleged that in December, 1851, he had a wharf boat lying in front of and against said wharf; that the city, under an ordinance prohibiting any person from keeping a wharf boat at any of the wharves, without a license, commenced suit against petitioner for keeping such boat, he having obtained no license; that said suit was appealed from the mayor's judgment to the District Court, where the question was presented as to the rights of the parties; that at the January term, 1852, said court found the facts to be, that the ground in front of said lot belonged to the complainant and those under whom he claims, to the middle of the main channel of the Mississippi river, and that the city had no right to the same as a wharf; and that said court rendered judgment against the town, in which suit the facts on which defendant relied as a de-

finer, were not pleaded, but given in evidence under the plea of *not guilty*; *Held*, That the judgment in that case was not conclusive upon the rights of the parties. *Haight v. The City of Keokuk*, 199.

6. The common effect of an appeal, where a supersedeas bond is filed, is to suspend the effect or operation of the judgment appealed from. *Danforth, Davis Co. v. Carter & May*, 230.

7. Where a decision of the District Court, dissolving an attachment, is appealed from in due time, and a supersedeas bond filed, the decision of the court is suspended; and if reversed, the property seized under the attachment, is still held by the writ. *Id.*

8. Where property was seized by attachment, some of which being perishable, was sold by the sheriff, and the proceeds thereof paid over to the clerk of the District Court; and where at the June term, 1855, of the District Court, and on the 2d day of the month, the attachment on motion of defendant, was dissolved without any order respecting the property attached, upon which the sheriff delivered the attached property remaining in his hands, and the clerk paid over the proceeds of the property sold, to the defendant's attorney, "taking an accountable receipt;" and where on the 6th day of June, and during the same term, the plaintiff appealed from the judgment of the court dissolving the attachment, and filed a supersedeas bond, which judgment was reversed by the Supreme Court; and where at the next term of the District Court after such reversal, the plaintiff obtained judgment against the defendant on his claim, and thereupon moved for a judgment against the property attached, and for a special execution, which motion was overruled; *Held*, That the property attached was still liable, and that the court erred in overruling the motion for a judgment against the property, and for a special execution. *Id.*

9. It is not true in all cases, that in order to plead a former judgment in bar of a subsequent suit, both the parties, and all the parties, must be identically the same. *Davis v. Milburn*, 246.

10. Where in an action to recover for the rent and occupation of a mill, under a lease, the defendant alleging, with other defences, that the plaintiff had brought a former suit against him, on a different cause of action, while the said lease was existing, and in that suit, had sued out a writ of attachment, and attached his cattle, carts, wagons, logs, lumber, and other property and material, by which and for which he carried on the business of the mill by means of which he was interrupted in the use of the mill, and could not run the same, and so the use and occupation thereof was lost to him for a long space of time—wherefore, and by reason of which, he is not liable for the rent of the mill; and where the plaintiff replied, that the defendant had, (prior to the present suit,) brought an action against the plaintiff, for the wrongful suing out of the said attachment, in which action the said defendant pleaded the same matters which are now pleaded in this action, to wit: the attachment of the said property, by and with which the said mill was carried on, as a ground for the recovery of damages, and that the said matters were permitted to go to the jury, and were heard and tried, in which action the said defendant recovered damages; and where the plaintiff offered in evidence, the record of the proceedings in the action for wrongfully suing out the attachment, to which the defendant objected: 1. Because the former suit was not between the same parties; 2. Because, on the trial of the former action, the court instructed the jury, that the then plaintiff could recover only for damages sustained prior to the commencement of the action, which objection was sustained, and the evidence excluded; *Held*, That the court erred in excluding the evidence. *Id.*

11. Before a prior judgment can be a bar to a subsequent action, the point or matter in issue between the parties, must have been *determined*, and such determination or decision must have been upon the merits. *Delany v. Reade*, 292.

12. If a suit shall be discontinued, or a plaintiff shall become nonsuit; or if, for any other cause, there had been no judgment of the court upon the matter in issue, the proceedings are not conclusive, and will not bar a subsequent suit for the same cause of action. *Ib.*

13. An irregular judgment is conclusive, until reversed or set aside. *Ib.*

14. Where a judgment in a criminal case, rendered in the Marshall District Court, after adjudging that the State recover a fine of two hundred dollars, and that execution issue therefor, contained the following provision: "And further be it ordered, that the clerk make a mittimus to the sheriff of Polk county, to confine the body of the prisoner in the Polk county jail, for the space of six months;" *Held*, 1. That the judgment was irregular in form, but that its meaning was, that the defendant be imprisoned for the time specified therein, besides paying the fine of two hundred dollars; 2. That as the record did not show that there was a sufficient jail in the county where the judgment was rendered, the presumption was in favor of the regularity of the proceedings of the court below, and the court could not say there was error in directing the imprisonment of the defendant in a different county. *Hughes v. The State*, 554.

JURISDICTION.

1. The proceedings and judgment of a court, within its jurisdiction, cannot be inquired into and set aside, in a collateral proceeding. *Hampson et al. v. Weare et al.*, 13.

2. Jurisdiction is conferred: 1. By the law; 2. By a petition, or whatever stands in its place; 3. By notice, when such is required. *Morrow v. Weed*, 71.

3. If there be a petition, or the proper matter of that nature, to call into action the power or jurisdiction of the court, its sufficiency cannot be called in question in a collateral proceeding. *Ib.*

4. If there be a notice or publication, or whatever of this nature the law requires, in reference to persons or other matters, its sufficiency cannot be questioned collaterally. *Ib.*

5. Where in an action of right, the defendant claimed title to the land in controversy, under an administrator's sale, made under the statute of wills, approved February 13th, 1843, and it appeared from the proceedings of the Probate Court, that on the 30th of July, 1846, the administrator filed his petition in said court, praying for a license to sell the said real estate, which petition alleged, that the indebtedness of the state amounted to about \$1,500, and the charges of administration to between \$150 and \$200, and that the personal estate was insufficient to discharge that amount—upon the hearing of which petition, the said court held the sale to be necessary, and made an order accordingly; and where it was objected in the action of right, that the petition was insufficient, for the reason that it did not state the value of the personal property, and that no specific account of the debts due by the defendant, was filed with the petition; *Held*, 1. That the petition was sufficient, under the third section of chapter ten of the act of 1843; and that it was within the jurisdiction of the Probate Court, to decide upon the sufficiency of the petition; 2. That the statute did not require a specific account of the debts due from the deceased to be set out. *Ib.*

6. Neither the jurisdiction, nor the proceedings, of the courts and magistrates as existing at common law, were unalterably settled and defined by the constitution of the United States, at the time of its adoption. *Bryan v. The State*, 349.

7. Section 11 of the first article of the constitution of the state of Iowa which provides that no person shall be held to answer for a criminal offence, unless on presentment or indictment by a grand jury, except in cases cognizable before that officer, at the time of the adoption of that constitution. *Ib.*

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8. Under chapter 85 of the Code, a justice of the peace has jurisdiction to hear and determine a complaint, charging a party with a marriage without a license. *White v. The State*, 449.

9. Where a controversy arises in our courts, upon a case from another jurisdiction, *prima facie* it is to be governed by the law of that jurisdiction. *Bean v. Briggs & Felthouser*, 464.

JURY.

1. The conduct and behavior of the jury before they retire to render their verdict, being in the presence of the court, is presumed to be under its control, and subject to its reprehension or punishment, if in violation of order, or wanting in due respect to the court, or its counsel. *Myers et al.*, 18.

2. To justify the court in setting aside a verdict, on the ground of the behavior of the jury, whether before or after the cause is submitted, the alleged misconduct should clearly satisfy the mind of the court, that a fair and impartial trial has not been had, and that the verdict is against the law and the evidence. *Ib.*

3. Section 1781 of the Code, which provides that after a case is called on to a jury, they must be kept together, without drink, except water, and without food, except when otherwise directed by the court, as to the parties, is directory in its character, and has reference more to keeping them together until they have agreed, and to what shall be done for them during their deliberation. *Cook & Owsley v. Walters*.

4. If a jury separate after agreement, without the consent of the court, may amount to misconduct on their part, for which they may be punished; but such separation does not necessarily make the verdict void, or require the court to prevent its reception by the court. *Ib.*

5. Where the court, soon after the jury retired to consider a case, adjourned for dinner, and before the court convened again, the jury, upon their verdict, sealed the same up, and separated, without the court, and without an agreement of the parties, that they might do so, and where the jury having been called into the box, and being asked by the court, if they had agreed upon their verdict, responded that they had, and passed the same to the clerk, sealed up in an envelope, to which the verdict the defendant objected, but the objection was overruled. That the verdict was properly received. *Ib.*

6. It is no part of the duty of a jury, nor have they any right to object to the pleadings what allegations are admitted or denied. *Hartman*, 154.

7. It is the province of the court alone, to examine the pleadings, and to determine if any of the allegations are to be taken as true, for want of the evidence to so state to the jury. *Ib.*

8. Where, in an action for the forcible detention of real estate, the case was tried before a justice of the peace, and taken by appeal to the District Court, and in which action the defendant answered, "not guilty," and the District Court were instructed, that every material allegation in the complaint, not specifically denied by the answer, should be taken as true, and that the instruction, as an abstract proposition, was correct. That the effect of it, was to submit to the jury a question that should have been decided by the court. *Ib.*

9. And where in such a case, the defendant asked the court to instruct the jury, "that a plea of not guilty was a sufficient denial of the plaintiff's allegations, and was sufficient to put the plaintiff upon proof of every material allegation set up in his petition," which instruction the court refused to give.

That under the circumstances of the case—the record showing there had been a trial before the justice of the peace, and the objection to the sufficiency of the answer being made for the first time in the District Court, after the testimony was submitted to the jury—the instruction should have been given. *Ib.*

10. The state law may make offences of inferior grades, originally cognizable by inferior courts, and the General Assembly may authorize trial by a jury of a less number than twelve men, in such inferior courts. *Bryan v. The State*, 349.

11. Where in an action, when the jury was about to retire to consider of their verdict, the defendant asked that the jury might be permitted to take with them, all the papers in the cause, except depositions, and particularly the affidavits filed by plaintiff at previous terms for a continuance, which the court refused to permit, and retained the affidavits, and all the pleadings to which demurrers had been sustained; *Held*, That the court did not err in refusing to permit the papers to go to the jury. *McClintock v. Crick*, 453.

12. Jurors cannot be compelled to make affidavits, showing that the jury disregarded, and refused to take into consideration, the instructions of the court. *Grady v. The State*, 461.

13. Nor can the declarations of jurors be received, to prove such a state of facts. *Ib.*

14. Where in a criminal case, the defendant filed a motion for a new trial, for the following reasons: 1. That the verdict was not warranted by the evidence; 2. That the verdict was contrary to law; which motion was sustained by an affidavit of his attorney, which alleged that one of the jurors stated after the trial, that the jury, in finding the verdict of guilty, disregarded, and did not take into consideration, the instructions of the court, but considered them contrary to law, and that they were not bound to consider them; and that said juror refused to make affidavit to the above statement, but said that it was true, which motion was overruled by the court; *Held*, That the motion was properly overruled. *Ib.*

JUSTICE OF THE PEACE.

1. Where in a suit commenced before a justice of the peace, by attachment, one M. was garnished as a debtor of the defendant, and required to appear on the day set for the trial of the cause; and where, on the day set for trial, the defendant failed to appear, and judgment was rendered against him by default; and where, when the garnishee appeared, one J. H. "also appeared, and claimed the money in the hands of M. to be his, and to be admitted to defend the same;" and where the plaintiff demanded a jury, and the jury returned a verdict for the plaintiff; and where judgment was rendered against M., the garnishee, for the money in his hands belonging to the defendant, and against the defendant, for the costs of suit, from which the defendant appealed, which appeal was allowed; and where, from other entries on the docket of the justice, it appeared, that on the day the appeal bond was filed, the defendant filed with the court, a writing constituting J. W. H. his agent to prosecute the appeal or settle the same, as he might think fit; that on the same day, the plaintiff filed with the justice a writing, authorizing the justice to settle for her all matters in controversy between herself and defendant, by his paying the principal and interest of the debt, she agreeing to pay the costs; and that the agent of the defendant, being on the next day, informed of said proposition, accepted the same, and ordered the appeal not to be sent to the District Court; and where, on the filing of the papers in the District Court, the appeal, on motion of the plaintiff, was dismissed; *Held*, 1. That the judgment against the defendant for costs, in the proceedings against the garnishee, was a judgment that he had the right to appeal from; 2. That the entries made by the justice on his docket,

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subsequent to the allowance of the appeal, were not such as made by him in his official capacity, and were of no valid count erred in dismissing the appeal. *Kimpson v. Hunt*, 340.

2. The eleventh section of the first article of the constitution prospective sense, and embraces such causes as may be before justices of the peace. *Bryan v. The State*, 349.

3. Under chapter 85 of the Code, a justice of the peace jurisdiction to hear and determine a complaint, charging a party a marriage without a license. *White v. The State*, 449.

LAND.

1. There may be possession *in fact*, of unimproved and *Langworthy v. Myers et al.*, 18.

2. One who enters on land, intending to take possession of no part of which is held adversely at the time of the entry, to the extent of his claim. *Ib.*

3. An entry upon land, with the intention of clearing and cultivation, is such an entry that the jury may be authorized to infer possession from it. *Ib.*

4. A party claiming a conveyance of real estate, who does cannot prove, that the land was purchased with his money, admitted to show, by parol evidence, that the purchase was in fact, or on his account. *Holland et ux. v. Hensley et al.*, 222.

5. Where a party seeks to divest another of the legal title on the ground of a parol gift, upon conditions, which he has complied with by him, the burden of proof is upon him to establish his petition, when they are denied by the respondent. *Williamson*, 279.

LAND WARRANT.

1. The title to a land warrant will not pass by delivery without. *Holland et ux. v. Hensley et al.*, 222.

LEWDNESS.

1. Where the offence on the part of those keeping a house of lewdness, could only be prohibited by a legal prosecution, a tenant could in no sense be said to be so far under the control as that his mere dissent or order, would amount to a prohibition to act, or to prohibit, would not amount to a permission. *The State*, 541.

2. To make a lessor liable under section 2712 of the statute permitting the lessee to use his house for the purposes of lewdness, there must be on the part of the lessor, a consent expressly given, or given by his silent acquiescence. *Ib.*

3. A mere failure to interfere or to prosecute, so as to prevent use, cannot be construed to amount to a permission, or into a tacit acquiescence in such use. *Ib.*

4. The State must show such acts or circumstances as justify a jury, that the lessor, having knowledge that the house was used for an illegal purpose, after the execution of the lease, not only remained assented or consented to such use: and it is not for the lessor to take some steps to manifest his dissent or disapprobation.

5. Where a party was indicted for having leased a house, knowing that the lessee intended to use the same as a place or resort for the purpose of prostitution and lewdness, and for having knowingly permitted such lessee to use the same for such purpose; and where the court instructed the jury as follows: "That if the defendant leased the premises for a legal and proper purpose, not knowing that it was to be used for an illegal purpose; but after the lease was executed, the lessee kept a place of prostitution and lewdness, and the defendant had knowledge of such illegal use, and took no means to prevent the same, he would be liable under the indictment;" *Held*, That the instruction was erroneous. *Id.*

LIEN.

1. Previous to the year 1849, V. sold to B., a tract of land, on which to erect a mill, and to secure the sum of \$800, due on the land, executed a deed of trust to V., under which the land was subsequently sold, and purchased by V. On the 16th of July, 1849, B. being indebted to R., for money paid by R., for the purpose of building a mill and other improvements on the land, executed a note to R. for \$325, payable in one year, and secured the same by a mortgage on the land bought of V., and also agreed that R. should hold a lien on the land, for all money, goods, materials and labor, furnished or paid by him, towards the erection of the buildings or mill dam. On the 2d of May, 1850, V. executes to R. an instrument in writing, to the effect, that "V. agrees that R. shall hold a lien for all moneys, materials and labor, paid for by said R., for building a mill or other improvements on said land, and said R. agrees to furnish B., on their agreement, such things as their contract calls for, to build said mill, which writing was signed by V., but not by R. When the land was sold under the trust deed, is not shown. In November, 1850, R. assigned the note, and delivered the mortgage from B. to the plaintiffs, and also delivered to them the agreement of V. On a bill filed by the plaintiffs, against B. and V., praying a foreclosure and sale as to the land, which shall postpone to the claim and lien of the plaintiffs, any interest of V. in the premises; *Held*, 1. That the agreement of V. with R., dated May 2, 1850, was an undertaking on the part of V., to give to R., a lien on the land, for all money, labor, or materials advanced by R., for the purpose of building the mill and other improvements on the land, before as well as subsequent to the date of the agreement, and included the sum for which the note of B. was executed. 2. That the court erred in excluding the agreement of V. from the jury. 3. That the plaintiffs, by virtue of the assignment of the note and mortgage of B., acquired the right, under the agreement of V., dated May 2, 1850, to a decree against V. postponing any claim he might hold against B. and the land, to the claim and lien held by the plaintiffs. 4. That the agreement of V. to give R. a lien, imparted a quality to the debt of B. to R., which passed to the plaintiffs with the assignment of the note. *Crow, M'Creary & Co. v. Vance*, 434.

2. The seizure and sale of a steamboat under the laws of the state of Missouri, will not divest the lien of a citizen of the state of Iowa, for supplies furnished such boat, while navigating the waters of this state. *Haight & Bro. v. Steamboat Henrietta*, 472.

3. Where an action against a steamboat to enforce a lien for supplies furnished, it appeared that the articles were furnished to said boat in the fall of 1855, in the city of Keokuk and state of Iowa; that afterwards, on the 20th of November, 1855, said boat was seized under a warrant, at the suit of D. and others, under the laws of the state of Missouri, for an indebtedness contracted while navigating the waters of that state; that under an order of court in Missouri, the sheriff, on the 22d of December, 1855, sold the said boat with all her tackle, fixtures and furniture to one M., who is still the owner, and who defends this suit; and that the notice of the suit of D. and others was limited to creditors having liens against said boat under the laws of Missouri, which laws excluded non-resident creditors, or those having debts contracted

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out of the state; *Held*, That the lien of the plaintiff was no proceedings in Missouri, and that the boat was liable. *Id.*

MEASURE OF DAMAGES.

1. Where in an action to recover damages for the non-estate, on an agreement which contained the following p bind myself, under the penalty of fifty dollars, to be paid (the plaintiff) if I fail in the fulfillment of the aforesaid agree agreement acknowledged the receipt of fifty dollars on the instructed the jury, that by the terms of the agreement, th titled to recover only one hundred and five dollars, being th by the plaintiff with interest, and the fifty dollars fixed as agreement; *Held*, That the instruction was erroneous, and named in the agreement, was not the measure of the p *Foley v. McKeegan*, 1.

MISDEMEANOR.

1. The marriage of persons without their having obtained dealt with as a misdemeanor, and in no other manner. *White*
2. In the case of a misdemeanor, where the fact charged appears to be unlawful, it is unlawful to allege the act to hav done. *Copps v. The State*, 502.
3. Such an averment is in no case essential, unless it be tion of the offence, as defined by statute. *Id.*

MORTGAGE.

1. Where in an action on a promissory note, for the sum in November, 1848, one-half payable in one year, and the years, from the date thereof, which action was brought, to payment, it appeared that the defendant, to secure the payr executed a mortgage on several parcels of real estate, situ New Hampshire; that the defendant having failed to pay due on said note and mortgage, the plaintiff, in March, 1850 ceedings under the laws of New Hampshire, to foreclose the of redemption in said lands; that in September, 1850, a dec that plaintiff should be put into possession of the lands mort ditional judgment against the defendant, for the amount of and interest; under which the plaintiff received possession c lands, on the 15th day of March, 1851, the defendant havir deem within one year; and that at the time of the execut gage, said lands were incumbered to a large amount, by m persons; which the plaintiff was compelled to pay; and w structed the jury, that the suit did not open up the foreck making up their verdict, they should ascertain the amount d gage, on the 15th of March, 1852,—then ascertain the amo brances—add these two amounts together—and from this on that day, of the two tracts of land, of which the plaintiff sion, and credit the mortgage with the remainder—and tha after such credit, with interest from that date, would be th verdict; *Held*, That there was no error in the instruction. *son*, 309.

2. And where in such a case, the court instructed the ju ises included in the mortgage, which were not entered upon thrown back upon the defendant, and the plaintiff was not t value; *Held*, That the instruction was correct. *Id.*

3. And where in such a case the court instructed the jury

ant should not be allowed anything for the rents and profits of the premises; *Held*, That the instruction was proper. *Ib.*

4. Where a mortgage is foreclosed, for an installment then due; and a subsequent suit is brought to recover a second installment, such second suit does not open the foreclosure; nor is the amount found to be due and owing in such case, open to investigation in the second suit. *Ib.*

5. Where a party under a foreclosure, takes possession of the mortgaged premises, instead of selling them, he should only be held for the value of the premises entered upon; and the defendant is entitled to a credit on the mortgage, *pro tanto*. *Ib.*

6. The assignment of a promissory note, secured by mortgage, carries the mortgage with it; and the assignee may maintain an action upon the mortgage in his own name to enforce the lien. *Crow, McCreary & Co. v. Vance*, 434.

7. The right of the mortgagee is a mere chattel interest, inseparable from the debt it is intended to secure, and transferable by a mere assignment of the debt, without deed or writing. *Ib.*

8. By an assignment of the debt the assignee is entitled to use all the remedies the assignor might have used, to enforce the lien of the mortgage against the debtor. *Ib.*

9. It is not necessary to the validity of a trust deed or mortgage, containing a provision, authorizing the grantee to sell the premises, on breach of certain conditions specified therein, that the grantee should join in its execution, or sign and acknowledge the same; or that he should signify his willingness to make the sale, or undertake the execution of the power, by any formal writing indorsed on the deed. *Leffler v. Armstrong*, 482.

10. Under such a conveyance, the grantee, upon breach of the conditions, may foreclose by sale without the aid of a court. *Ib.*

11. Where a deed of trust or mortgage authorizes the grantees to sell the premises, upon breach of the conditions contained in the conveyance, first giving thirty days' notice of the time and place of sale, a publication of the notice of sale for five successive weeks in a newspaper—thirty days having elapsed between the first publication and the day of sale—is sufficient notice. *Ib.*

12. A mortgagee of real estate is a purchaser, within the meaning of the recording laws of this state. *Porter et al. v. Green et al.*, 571.

NEW TRIAL.

1. Where in an action of trespass, charging the cattle of defendant with breaking into the close of plaintiff, and destroying his crops, the defendant filed a motion for a new trial, for the reason, among others, that he had discovered new evidence, which motion was supported by the affidavit of the defendant, in which he stated, that he had been informed, and believed, that he could prove by A. M., that A. M. owned a cow that was exceedingly bad about breaking down fences; that said cow was running at large in the prairie at the time the trespass complained of was committed; and that A. M. afterwards sold said cow, because of her frequent trespasses in breaking into various persons' inclosures; that he (defendant) has been informed, and believes he can prove, by one P. M. that he was growing a crop in the same inclosure, when the trespasses complained of were committed; and that while at work in the early part of the season, when the cattle first began to get into said inclosure, the fence was first thrown down, and the cattle first led in by the said cow; that he is informed he can prove this last fact by one J. W.; that the said witnesses reside at a distance from court, and he has not had time, nor been able, to procure their affidavits to file with the motion; that he was entirely taken by surprise by the evidence of the plaintiff, that the fence was thrown down by his cattle, and should have been prepared to show that his

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cattle were not unruly, and accustomed to break over ordin-
that he expected to be able to prove all the above matters
which motion for a new trial was overruled by the court; *Held*,
tion was properly overruled. *McManus v. Finan*, 283.

2. Where in a criminal case commenced before a justice
which the defendant was charged with keeping intoxicating
tent to sell the same within the state, the defendant was
fined; and where the defendant, in his affidavit for an app
there was no evidence showing that he owned or kept any i
whatever; that one Mason, the officer who served the war
he found a barrel of whiskey in the back yard of defendant's
did not know to whom it belonged; and that the justice
liquor was found on defendant's premises, it was presumed th
intent to sell, and on that evidence, and on that alone, re
against the defendant; and where the District Court refus
a new trial, and affirmed the judgment of the justice; *Held*,
erred in not granting the defendant a new trial. *Garrettsen*

3. Where it appeared from affidavits in a cause, that the c
the court below, on the last day of the term; that while
their room, deliberating on their verdict, the court sent them
by the bailiff; that after the jury returned a verdict for the
fendant moved the court to set aside the verdict, and grant
that while his counsel was arguing this motion, the judge ad
sine die, refusing either to sustain or overrule the motion, and
the counsel time to prepare a bill of exceptions, the judgment
Court was reversed, and a new trial granted. *Campbell*
Ayres, 358.

4. Where there is a motion for a new trial upon some grou
up the evidence, the appellate court looks into that evidence
tion; but it cannot review the finding of the court below, or
as a verdict, on errors assigned thereon. *Bowen & King v. B*

5. Where in a criminal case, the defendant filed a motion
for the following reasons: 1. That the verdict was not warra
dence; 2. That the verdict was contrary to law; which motio
by an affidavit of his attorney, which alleged that one of the ju
the trial, that the jury, in finding the verdict of guilty, diav
not take into consideration the instructions of the court, but
contrary to law, and that they were not bound to consider
said juror refused to make affidavit to the above statement
was true, which motion was overruled by the court; *Held*,
was properly overruled. *Grady v. The State*, 461.

6. When in an action of replevin, it appeared from the re
District Court, the attorneys on both sides, in the argument,
to the jury; that the court passed upon the instructions,
"given," some "refused," and some "modified," and gave th
without again reading them, no objection being made by cot
the jury returned their verdict, a motion was made for a n
ground that the court erred in giving, and in refusing to give
and also that the instructions were not read to the jury, at w
tions were taken to the instructions given and refused, wh
overruled by the court; and where it further appeared from
the court gave an oral charge to the jury, which was not ma
record; *Held*, That the motion for a new trial was properly ove
Lusk, 469.

7. Where an affidavit for an appeal in a criminal case show
not controverted by the return of the justice, the appellant
a new trial. *Miller v. The State*, 505.

8. It is not sufficient reason for setting aside the verdict of a jury, and ordering a new trial, that a portion or all of the jurors, supposed that their verdict, if for the defendant, would not be a bar to a subsequent suit by the plaintiff, for the same cause of action. *Minter, Ex. v. Hile et ux.*, 583.

9. Where, in an action against husband and wife, on a promissory note, made by the wife as executrix, the execution of which note was denied under oath, the jury returned a verdict for the defendants; and where the plaintiff moved the court for a new trial, on the ground of a mistake of the jury as to the law and facts of the case, and a wrong impression as to the rights of the parties, which motion was accompanied by the affidavits of two of the jurors—one of whom states, that in making up the verdict, he was under the impression, that if the jury found for the defendants, it would not prevent the plaintiff from bringing another suit, and recovering of the defendants; that he was satisfied that defendants owed plaintiff the money; and that except under the impression stated, he would not have consented to a verdict against the plaintiff; and the other states, that he was satisfied that the wife had borrowed the money claimed by plaintiff, and had directed the note sued on, to be signed and executed for her; that in agreeing to a verdict for defendants, he supposed that such verdict would not be a bar to a future suit and recovery by the plaintiff against defendants; that the greater part of the jury were of opinion, that the verdict for defendants would be no bar; and that he is not now satisfied with the verdict, and would not again consent to a verdict for defendants; and where the plaintiff also moved the court to allow him time to procure the affidavits of the jurors who tried the cause, in order to show that the jury was mistaken in the law, as to the conclusiveness of their verdict, in case they found for defendant, which motion was supported by the affidavit of the plaintiff's attorney, in which he states that he had conversed with two of the jurors, since the rendition of the verdict, and whose affidavits had been procured and filed; that he believed there was sufficient ground to authorize the granting of a new trial, if time was allowed to procure the affidavits of the remaining jurors; and that the plaintiff would be able to show that the jury were mistaken in the law applicable to the case, both of which motions were overruled by the court; *Held*, That the motions were properly overruled. *Id.*

NOLLE PROSEQUI

1. In an action on an implied assumpsit against several defendants, a *nolle prosequi* as to a part of the defendants, is not regarded as a *retraxit* or release, and therefore it does not operate to discharge the other defendants. *Quigley v. Merritt et al.*, 475.

2. Where in an action against several defendants, for money had and received for the use of the plaintiff, the defendants severed in their pleas, each pleading matter going to his separate discharge; and where on the trial, after some testimony had been given to the jury, the plaintiff entered a *nolle prosequi* as to all the defendants, except one; and where the court, on motion of the remaining defendant, held that the *nolle prosequi* operated to dismiss the action as to the remaining defendant also, and the action was dismissed; *Held*, That the court erred in dismissing the action. *Id.*

NONSUIT.

1. An appeal lies from a judgment of nonsuit, rendered by a justice of the peace. *Gilson v. Johnson*, 463.

NOTICE.

1. Where a deed of trust or mortgage authorizes the grantees to sell the premises, upon breach of the conditions contained in the conveyance, first

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giving thirty days' notice of the time and place of sale, a notice of sale for five successive weeks in a newspaper—*It* elapsed between the first publication and the day of sale—*Leffler v. Armstrong*, 482.

2. Where in a proceeding in equity to redeem certain real a deed of trust, or mortgage, containing a power of sale, it L. being indebted to C., the said I. L. and one J. L. to set on the 25th day of October, 1842, executed a conveyance of & C., which deed provided that upon the failure of said grantment according to the terms of the deed, the said P. & C. w sell said premises to the highest bidder for cash, "first g public notice of the time, place, and terms of sale, and of t sold, by advertisement in some newspaper printed in Burlit tory," and which deed also contained the following clause parties of the second part (P. & C.), covenant faithfully to j the trust herein created. In witness whereof, the said part set their hands and seals, the day and year above written,' signed and acknowledged by the grantors, but not by the i where on the 8th day of May, 1847, default having been r ment of said debt, the trustees sold the land to the responc 1848, executed and delivered to him a deed for the same sale was given by publication in a newspaper, printed in l publications were made on the 8th, 15th, 22d, and 29th of 6th of May, 1847; and where on the 26th day of Septembe plainants applied to respondent to redeem said real estate, his purchase money and interest, which was declined by the and where, upon the hearing, the petition of the complainan *Held*, 1. That it was not necessary for the trustees to becor conveyance; 2. That the notice of sale was sufficient, and That the bill was properly dismissed. *It*.

3. A notice of an election, published on the morning of the election is to be held, is no notice, in any legal and p *State ex. rel. Lewis v. Young*, 561.

4. Where an act for the incorporation of a city, provided take effect from and after its publication in certain newspaper and required the trustees of the township in which the ci cause a vote to be taken on the acceptance of said city cha ner in which township elections are now called and holde; the day on which such vote was to be taken, and requirec be held between the hours of nine and ten, A. M., and ft of said day; and where the act was published in one of ti 13th of February, 1857, and in an *extra* of the other page February, the day fixed in the act for taking the vote o charter, and before ten o'clock of said day, about 250 co were circulated in said city; and where the only notice of sa adoption of the charter, was contained in said extra, issue of the election—at which election the said charter was ad the act contemplated that the township trustees should d manner of calling and holding said election, and that the r plied with neither the letter nor the spirit of the law. *It*.

ORDINANCE.

1. An ordinance of a municipal corporation can have n force; but persons or property coming within the territorial poration, come under its authority. *Gosselink v. Campbell*, 2

2. Where a city charter, adopted in pursuance of the prov 42 of the Code, gave to the city council the power to establ

and ordinances as may be necessary and proper for the good regulation, health and safety of the citizen, and the cleanliness of the city; to prohibit stock from running at large in the city; and to make any other ordinary, suitable and proper police regulations, and to impose fines and penalties for the violation of such regulations, by-laws and ordinances; and where the city council, acting under such charter, adopted an ordinance, prohibiting hogs from running at large, the first section of which provided, that no hogs shall be allowed to run at large in the city, and owners are required to keep them up, and that any person failing to comply with the ordinance, shall be deemed guilty of a misdemeanor, and pay a sum not less than one, nor more than five, dollars; and the second section of which, made it the duty of the marshal to take up all hogs found running at large in the city, and advertise them; and if the owner did not, within three days, come and pay the fine and costs, and take care of the hogs, to sell them to the highest bidder; and after paying the fine and costs, to pay the balance of the money to the owner; and where an action of replevin was brought against the city marshal, by a party residing beyond the corporate limits, to recover the possession of certain hogs belonging to him, found running at large within the corporation, and taken up under the ordinance; *Held*, 1. That the city had authority, under the charter, to pass the ordinance; 2. That the city marshal had authority, under the ordinance, to take up the hogs; 3. That the first section of the ordinance, is within the meaning and spirit of the statute and the charter; 4. That the second section of the ordinance, was sufficient for the abatement of the nuisance and the payment of the charges, but not for the enforcement of the fine. *Id.*

5. The ordinance of 1787, for the government of the Northwest Territory, made the common law the law of that territory; that ordinance was extended over Wisconsin, and then over Iowa; and although the laws of Wisconsin and Michigan were repealed by the legislature of Iowa, in 1840, the ordinance of 1787 was not affected by that repeal, but remained in full force. *O'Ferrall v. Simplot*, 381.

6. The ordinance of 1787, with subsequent acts, made the law of dower one of the fundamental laws of the territory of Iowa. *Id.*

ORIGINAL NOTICE.

1. Where by a rule of the District Court, the time for answering is different from that fixed by the Code, it is not essential that the original notice should inform the defendant of the time when, by such rule, he is required to answer. *Worster, Templin & Co. v. Oliver*, 345.

2. Where a plaintiff, in his original notice, requires a defendant to answer by a day different from that fixed by the rules of the court, the plaintiff should be held to the time fixed in his notice, and not be permitted to have judgment entered before that day. *Id.*

3. Where by a rule of the District Court, parties defendant were required to plead, answer, or demur, on or before the morning of the first day of the term; and where an original notice notified the defendants to appear and answer, on or before the morning of the second day; and where at the return term, a motion was made to quash the original notice, for the reason that the said notice does not inform the defendant of the time when, by the rules of the court, they are required to plead, which motion was sustained by the court, the notice set aside, and the cause continued for want of service; *Held*, That the court erred in quashing the original notice. *Id.*

4. An original notice in an action of trespass *quare clammum fragit*, as follows: "To G. D.: Sir—You are hereby notified that there is now on file in the office of the clerk of the District Court of Boone county, state of Iowa, a petition of the Des Moines Navigation and Railroad Company, claiming of you the sum of five hundred dollars, as money due for your trespasses upon, and injuries done, certain parcels of real estate of said petitioner; and that unless

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you appear and answer thereto, on or before the morning of the next term of the District Court of Boone county, state of Iowa, will be rendered against you thereon," and signed by the plaintiff, is sufficient. *The Des Moines Nav. & R. R. Co. v. I*

5. An original notice need not be as full and specific as th

6. Where an original notice in an action commenced in the the indorsee of a promissory note, read as follows: "To J. C hereby notified that there is now on file in the office of the District Court of B. county, Iowa, a petition of E. E., claiming of thirty dollars, as money due on a promissory note; and appear and answer thereto, on or before the second day of said court, judgment will be rendered against you there signed by the attorneys of the plaintiffs; and where the de quash the notice, because: 1. The said notice does not set the nature of the claim against the defendant; 2. Said not that the note sued on, was assigned by the payee, or any motion was sustained by the court, and the cause continued notice informed the defendant of all that the law deemed the defendant upon his defence; and that the court erred notice. *Elliott v. Corbin*, 564.

7. A party may appeal from an order of the District Co original notice. *Ib.*

PARTIES.

1. It is not true in all cases, that in order to plead a for bar of a subsequent suit, both the parties, and all the parties the same. *Davis v. Milburn*, 246.

PARTNER.

1. A partner, who in an action against the partnership, or living members of a partnership, to recover a debt due by it permits a judgment to go against him for the debt and costs, a competent witness, to prove that a co-defendant was not a member partnership. *Danforth, Davis & Co. v. Carter & May*, 230.

2. In such a case, the interest of the witness is against him; and the plaintiff cannot debar the testimony of the witness to take the judgment offered. *Ib.*

3. Where in an action against two persons, as surviving members, the defendants, on the trial, offered to permit the judgment for the amount of their claims and costs, against one of them, and thereupon claimed the right to read the deposition in evidence, for the purpose of proving that the other defendant was not a member of such copartnership, which judgment the plaintiffs and the deposition was rejected; *Held*, That the plaintiff could take the judgment, and that the evidence was admissible. *I*

4. In an action against a copartnership by a creditor, the partners, made while the firm was in existence, and before it arose, are admissible in evidence to show that one of the partners charged, was not a member of such partnership. *Ib.*

5. Such declarations to be admissible as evidence, must be made before difficulty arose, whilst the business was going on, and in relation to persons with whom the firm dealt, and the world

6. The admissibility of the declarations of a partner, as to the members of the firm, does not depend upon the fact that

deceased; but are receivable, upon the ground, that as the plaintiff must recover against all the defendants or none, and as such partner, if called to testify in person, would be testifying *in presenti*, he would be interested to defeat the suit. *Ib.*

7. The testimony of a witness as to whom he gave credit, as members of a copartnership, when selling goods to the firm, is but the opinion of the witness, and is not receivable in evidence. *Ib.*

8. The declarations of a party sought to be charged as a partner, are not admissible to prove that he was not a member of such copartnership. *Ib.*

PENALTY.

1. Whether the sum specified in a contract, as a penalty for the non-performance thereof, shall be considered as a penalty, or as liquidated damages, is a question of construction, on which the court may be aided by circumstances extraneous to the writing. *Foley v. McKeegan*, 1.

2. Although the parties may call the sum fixed upon in the contract, a "penalty," or give it no name, or style it "liquidated damages," the court in any or all of such cases, treat the sum as one or the other, depending upon the nature of the agreement, the surrounding circumstances, the intention of the parties, and the reason and justice of the case. *Ib.*

3. If, by the agreement, it is doubtful whether the parties intended that the sum specified, should be a penalty or liquidated damages, courts incline to treat the contract as creating a penalty to cover the damages actually sustained by the breach, and not as liquidated damages. *Ib.*

4. Where an action was brought upon a written agreement, which read as follows: "I, J. M., have this day agreed and sold, 200 acres of land, the same more or less, [here follows a reference to the lands,] for which I am to receive \$880.00; \$50 of which I am now to receive, and the same is to be forfeited by M. F., if he does not pay the balance, on or before the 10th day of April, 1854, and then I will give the deeds of the aforesaid places, at the time the money is paid. I, the said J. M., promise to give the said M. F., next April, together with the lands, [here follows several items of personal property,] and to put 500 rails on the fence of the field. I also bind myself, under the penalty of \$50, to be paid to the said M. F., if I fail in the fulfillment of the aforesaid agreement; and to the aforesaid agreement, we both sign our hands;" and where the petition claimed damages for the non-performance of the contract; *Held*, That the sum inserted in the contract, to be paid on its non-fulfillment, was designed by the parties as a penalty, and not as liquidated damages. *Ib.*

5. A penalty provided by statute against an act renders the act illegal, though not expressly prohibited. The penalty amounts to a prohibition. *Bacon v. Lee & Gray*, 490.

PERFORMANCE.

1. Where a party seeks to take a cause out of the operation of the statute of frauds, upon the ground of a part performance, it is indispensable that the parol contract, agreement or gift, should be established by clear, unequivocal and definite testimony; and the acts claimed to have been done under the contract, should be equally clear and definite, and referable exclusively to the contract or gift. *Williamson v. Williamson*, 279.

PLEADING.

1. It is no part of the duty of a jury, nor have they any right to determine from the pleadings what allegations are admitted or denied. *McKinney v. Hartman*, 154.

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2. It is the province of the court alone to examine the any of the allegations are to be taken as true, for want of nial, to so state to the jury. *Ib.*

3. Where in an action for work and labor performed, the d admitting the number of days claimed, but denying that it worth the sum of two dollars per day, and alleged that in parties disagreeing as to the price, had a settlement, at w that the defendant should pay the plaintiff \$1.37 1-2 per should pay one-half of the sum so found due within two wee and the other half in May then next following; and where t alleged, that the defendant paid to the plaintiff twenty d week, which the plaintiff received, and that in twelve day ment, he tendered to the plaintiff twenty-six dollars, the b then due, which balance he pays into court; and where th denying the settlement and agreement, and the payment an money, and also pleaded that the agreement was without which the defendant rejoined that there was a good and valu for the agreement; and where the court instructed the jury, plaintiff commenced his action for compensation, the partic upon the amount due, and fixed the time when payment sho an agreement is to be considered an account stated, and is v 1. That the answer of the defendant was not a plea of accor but a plea of an account stated as the amount to be paid, a ment as to the time of payment. 2. That the agreement wi in its character. *Cool v. Stone*, 219.

4. The principle that an agreement, without consideratio sum than is due in discharge of the debt, cannot be pleaded tion for the whole debt, does not apply to cases where the s dated. *Ib.*

5. If it is claimed that the law of the place of contract, unknown to our law, such foreign law should be proven, an in proof, should be properly averred or set out in the pl *Briggs & Felthouser*, 464.

6. If a party would introduce proof of the laws of a forei sufficient to aver, as a plaintiff, that his right to recover is law or statute of another state, where the contract was ma cient for the defendant to aver, that the plaintiff cannot rec the provisions of such foreign statute; but he must plead th ute relied upon, and set it out as he would any other fact in court may be able to see and judge, whether the proceeding the defence tenable, under such law.

7. The system of pleading and practice introduced by t plates plainness of averment, and a clear and logical statemen ter relied upon for a recovery or defence, with even more was necessary under the common-law practice. *Ib.*

8. In actions *ex contractu*, as well as in those *ex delicto*, the j a *nolle prosequi* as to a part of the defendants, when they se and plead matter going to their personal discharge. *Qui al.*, 475.

9. So, when they simply sever in their pleas, without look of the plea. *Ib.*

10. Allegations in a pleading, not responded to, must t *Plummer v. Roads*, 587.

POSSESSION.

1. There may be possession *in fact* of unimproved and *Langworthy v. Myers et al.*, 18.

2. One who enters on land, intending to take possession of the entire tract, no part of which is held adversely at the time of the entry, is in possession to the extent of his claim. *Ib.*

3. An entry upon land, with the intention of clearing and fitting it for cultivation, is such an entry as that the jury may be authorized to infer actual possession from it. *Ib.*

4. Where in action of forcible entry and detainer, the plaintiff, for the purpose of establishing actual possession of the premises, proved that in the spring of 1864, he had the premises, which were uninclosed, surveyed, and a map made; that at the same time, stakes were set at the corners, and the trees blazed on the boundary lines; that a portion of the ground was also subdivided and laid off into smaller lots; that stakes were set up at the corners of respective lots, rendering the boundaries visible, in the usual way of laying out town lots; that a street was also made through the adjoining land of the plaintiff, which was graded so as to extend some five or seven feet on the premises in dispute; that the trees and under brush growing on the premises where the street was opened, were cut off and hauled away by the plaintiff; that the plaintiff claimed to own some of the adjoining lots; and that he had sold lots adjoining the premises in dispute, to different persons; and where the court instructed the jury, that *actual possession* of real estate may be shown by any act of possession, as where the owner goes upon the land to take possession, or to exercise any other act of ownership; and if they believed that the plaintiff exercised over the premises those acts of ownership usually exercised by owners over land on which they do not actually reside, they might infer *actual possession*; and that it was not necessary to such *actual possession*, that the premises should be surrounded by a fence, or built upon; and where the jury found that the plaintiff was in the *actual possession* of the premises, which verdict the court refused to set aside on motion; *Held*, That the instruction was correct, and that there was sufficient evidence to justify the jury in finding that the plaintiff had *actual possession* of the premises at the time of the entry by the defendants. *Ib.*

5. Where in an action of forcible entry and detainer, the court instructed the jury as follows: "1. That if the jury believe that there were indications upon the ground in dispute, at the time defendants took possession, of its being controlled and actually possessed by some other person, it was sufficient to put defendants upon inquiry, and they had no right to take possession of the land while it seemed to be in the possession of another person. 3. If the jury believe that defendants took possession secretly, and in such way as to avoid observation, they are authorized to believe that defendants meant to acquire an undue advantage, by which they ought not to be benefited. 8. That if the jury believe that defendants procured a surveyor to run out said lots, under an injunction of secrecy; that they on the same day followed close on the heels of the surveyor, with loads of boards and posts; that they commenced the construction of a hasty unsubstantial fence, on the side most out of view from the city; that they built and finished such fence in the utmost haste; that they put up in the same manner, a shanty of boards upon the lot, out of sight among the trees; that these improvements were made with the utmost secrecy and expedition, the jury are authorized hence to infer that the entry of defendants upon said premises, was by fraud and stealth." *Held*, That the instructions were legal and proper. *Ib.*

PRACTICE IN CIVIL CASES.

1. An amendment of a petition, showing the character in which the plaintiff sues, but not changing the plaintiff, is permissible. *Hunt v. Collins*, 56.

2. After the filing of a plea in abatement, alleging that the plaintiff held the cause of action in a representative capacity, and not in his own right, and after a finding for the defendant on such plea in abatement, and before judg-

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ment is rendered on the finding, the plaintiff may amend his show the representative capacity in which he sues, upon which court may impose. *Ib.*

3. Where the allegations in a petition for an attachment, where they are improperly alleged, they are to be reached by at the writ of attachment. *Ib.*

4. Where a question of fact is tried by the court, and its reduced to writing, under section 1793 of the Code, the appellate court reviews the finding of the court on such question, as on a trial, on the ground that the verdict is against the evidence warrant such review, all the evidence on which the finding was had, must be before the appellate court. *Danforth, Davis & May*, 230.

5. Where there is a motion for a new trial upon some ground up the evidence, the appellate court looks into that evidence, but it cannot review the finding of the court below, or of a verdict, on errors assigned thereon. *Bowen & King v. Hale*.

6. A set-off is not a defence to an action, and should be separately. *Ib.*

7. When the answer or replication of a party, is required to be under oath, as to any matter stated in the previous pleadings, and such answer or replication is evidence conclusive, in favor of the same, as to the matters of fact about which the opposing party has made disclosure, unless it is overcome by the testimony of two witnesses, corroborated by other circumstances and facts, which testimony a greater weight than such answer or replication equivalent in weight to one witness. *Bacon v. Lee & Gray*,

8. A replication under oath, which neither admits nor denies the pleading to which it is a reply, and in which the party alleges that he possesses no knowledge, and has no means of knowing to such facts, and calls upon the opposing party to prove the answer, is no testimony upon the facts in controversy, and has the same effect as the testimony of a witness. *Ib.*

9. A replication under oath to matter stated in the answer, where such reply was called for, is not evidence for the party making the replication. *Ib.*

10. Where, after a change of venue is ordered, the adverse party re-docket the cause, and the party taking the change, makes appearance by his attorneys, and proceeds to the trial of the cause, and assigns for error in the appellate court, the decision of the court is affirmed. *Eckles v. Kenny*, 539.

11. Where a plaintiff dismisses his suit, he is liable for all costs made in the case, and not alone for those that may be taxed against the suit if dismissed. *Acres v. Hancock*, 568.

12. A plaintiff cannot, by dismissing his suit, and paying the return of the writs and process in the hands of the officer, avoid the costs made thereon. *Ib.*

13. Where a transcript from a justice of the peace, does not show the amount of the costs in the case, the District Court may require the party to certify to that court, the amount of such costs. *Ib.*

14. If a party desires to have the appellate court review the decision of the District Court, in sustaining or overruling a demurrer, he must in chief to be rendered in that court, on the demurrer. *Pl.* 587.

PRACTICE IN CHANCERY CASES.

1. Where there are several respondents to a bill in equity, against whom the same claim to relief is made, some of whom deny the right of the complainant to the relief sought, while others allow defaults to be entered against them, the complainant is not entitled to a decree against those in default, unless he establishes his right to the relief prayed for against those who have appeared. *Pierson v. David et al.*, 410.

2. A complaint in Chancery is required to satisfy the chancellor that he is entitled to relief, although there has been no appearance by the respondent. *Ib.*

3. If the proof made, shows a want of equity in the complainant's case, he must fail in his suit. *Ib.*

4. Where a creditor's bill was filed in September, 1854, which did not require the respondents to answer under oath, and the answer to which was not sworn to; and where, after the cause had been pending two or three terms, and over a year, the respondents asked and obtained leave to file an amended answer, in the nature of a plea, and on the 16th of June, 1856, filed an answer, consisting of the entire former one, with an addition setting up other matter, which amended answer was sworn to; *Held*, That the answer could not be treated as a sworn answer. *De France v. Howard et al.*, 524.

5. Where in a proceeding seeking the specific performance of a contract for the conveyance of land, a controversy arose in the Supreme Court, whether the complainant had in the District Court, introduced certain receipts (now lost) showing the payment of the purchase money; and where, upon the *ex parte* affidavits submitted by the parties, as to the fact in controversy, it was left in great doubt, whether such receipts had been produced and offered in evidence; *Held*, That the court might either determine the case upon the record and affidavits, or might, in the exercise of a sound discretion, remand the cause, for the purpose of having the District Court embody, in a proper bill of exceptions, the facts as to the proof made on the hearing. *Tasker v. Marshall*, 544.

6. Where a bill in chancery charges material facts, to be within the knowledge, and certain acts to have been done at the instigation, of the respondent, and the answer does not respond to such charges, such charges are to be taken as true. *Compton v. Comer*, 577.

7. A respondent in chancery cannot pray anything in his answer, except to be dismissed the court. *Ib.*

8. If he has any relief to pray, or discovery to seek, he must do so by a bill of his own, or he may make his answer a cross bill. *Ib.*

PRACTICE IN CRIMINAL CASES.

1. In criminal cases commenced before a justice of the peace, and appealed to the District Court, the affidavit for the appeal must be taken as the basis of the case in the District Court. *Garrettson v. The State*, 338.

2. If the facts alleged in the affidavit are not correctly stated, the prosecutor should cause the justice to certify the true state of the transaction. *Ib.*

3. On appeal to the District Court, in a criminal case, the record from the justice constitutes no part of the evidence, on the trial anew in the District Court. *Bryan v. The State*, 349.

4. A warrant of arrest in a criminal case, which follows substantially the form given in the Code, is legally sufficient. *Devine v. The State*, 443.

5. An information that follows the statute in every essential requisite, is sufficient. *Ib.*

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6. Where an information was subscribed and sworn to state of Iowa, Benton county:—1, James L. Pauly, being d and say, that I believe the matters and things set forth in the going information, are true," which was signed by the depos the jurat of a justice of the peace was attached; *Held*, Th was properly subscribed and sworn to. *Ib.*

7. Where a motion is made to dismiss an appeal in a crim sufficiency of the affidavit of appeal, the facts stated in the taken as true. *Beckman v. The State*, 452.

8. If the State wishes to controvert the statements of th appeal, as to the testimony given on the trial before the just be obtained requiring the justice to certify to the District dence on the trial before him. *Ib.*

9. Where an affidavit for an appeal in a criminal case, sets against the defendant, and avers that the State has failed to laid in the information; that the judgment of the justice w contrary to the evidence; and that injustice has been done ti sufficient to entitle the defendant to an appeal, and to ha of the justice reversed, or, at least, to a new trial in the D

10. Section 3094 of the Code, requires that the supreme stay of proceedings, shall make the order, and prescribe the recognizance. *The State v. McCloskey*, 496.

11. The recognizance, or a copy of it, should be returned Court, with the record of the case; and that court, where the and remanded, should make an order concerning the future ac charged, answering to the condition of his undertaking. *Ib.*

PRESUMPTION.

1. In the absence of any showing to the contrary, the pre there was sufficient evidence to authorize the judgment, and ceedings were regular. *Brady v. Malone*, 146.

2. The appellate court will presume in favor of the regul ceedings of arbitrators. *McKinney v. The Western Stage Co.*,

3. Where a judgment in a criminal case, rendered in the Court, after adjudging that the State recover a fine of two and that execution issue therefor, contained the following further be it ordered, that the clerk make out a mittimus to ti county, to confine the body of the prisoner in the Polk co space of six months;" *Held*, 1. That the judgment was irreg that its meaning was, that the defendant be imprisoned for t therein, besides paying the fine of two hundred dollars; 2. T did not show that there was a sufficient jail in the county ment was rendered, the presumption was in favor of the regu ceedings of the court below, and the court could not say ti directing the imprisonment of the defendant in a different co *The State*, 554.

PROMISSORY NOTES.

1. Where an action was brought on three promissory n account, to which the defendant answered, alleging that he account; that the promissory notes were signed by him a notes only, for the benefit of St. M., who was the real deb them in circulation; that the larger of said notes was afterwa paid by St. M.; that the other two notes came into the han who obtained payment of them, by suit, judgment, and exe

held an execution against S., in favor of L., with instructions, to levy upon the same as the property of said S., which was accordingly done by the sheriff, and he then took said note into his possession; and where the plaintiff moved for a rule on the sheriff to deliver up said note, that it might be given in evidence on said trial, which rule the court refused to make, but permitted said plaintiff, against defendant's objection, to introduce copies of said note, and the assignment, properly proven; *Held*, 1. That the court erred in refusing the rule, requiring the sheriff to surrender the note; 2. That secondary evidence of the note and assignment was rendered necessary by the wrongful act of defendant; and that if its admission was erroneous, the defendant could not take advantage of the error. *Lehman v. Cobb*, 534.

15. The alteration of a promissory note, with the assent of the maker, at the time of, or after, the alteration, does not render it void. *Grimstead v. Briggs*, 559.

16. Where, in an action on a promissory note, by the indorsee, against the makers and indorser, it appeared from the evidence, that the note was made on the 29th of July, 1856, and was due on the first of November following; that the note, at the time of its execution, did not contain the words, "with ten per cent. interest;" that the words were inserted after the execution of the note, but by whom, or at what precise time, is not known; that before the maturity of the note, J., one of the makers, left the state, and was insolvent; that between the first and tenth of November, 1856, B., the other maker of the note, called upon the attorney of the plaintiff, for the purpose of getting the same to send to the residence of his co-maker, for payment; that the note was delivered to him, he giving a receipt therefor, at which time the note contained said specification as to interest; that B. recommended plaintiff to buy the note; that after B. knew of the alteration of the note, he instructed plaintiff's attorney, to bring suit thereon; and that he, at no time, before the commencement of the suit, made any objection to the alteration of the note; *Held*, That the assent of B. to the alteration might have been reasonably inferred, and that he was liable to pay the note. *Id.*

RECOGNIZANCE.

1. In proceedings against bail on *scire facias*, the burden of proof is on the defendant, to show cause why the recognizance should not be estreated. *The State of Iowa v. Carr*, 289.

2. The execution of the recognizance will be taken as proved, unless denied under oath. *Id.*

3. Where in a proceeding on *scire facias* to estreat a recognizance, it appeared from the record, that the warrant for the arrest of the principal was issued, March 5, 1855; that the recognizance was dated May 25, 1855; and filed with the clerk of the District Court, June 7, 1855; and that the affidavit of the bail, that he possessed the qualifications prescribed by the statute for bail, was indorsed on the recognizance; and where it did not appear from the record, by whom the recognizance was taken or accepted; or that the party accused was under arrest, or required to give bail; or that the amount of the bail had been fixed by the court; or, if the recognizance was taken by a justice of the peace, that he had authority to take it; *Held*, 1. That no such connection was shown to exist between the indictment against the principal, and the recognizance declared on, as would authorize the court to infer that it was part of the record in that cause; or if so, that it was rightfully a part of it; 2. That the affidavit of the bail as to his qualifications, indorsed on the recognizance, was not sufficient to give vitality and effect to the recognizance, or to show that it was ever taken or accepted as a valid undertaking, by a court or magistrate, of competent authority. *Id.*

4. Where it does not appear from a recognizance, that it was taken or accepted as a valid undertaking, by a court or magistrate of competent authority,

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action: 2. That the demurrer to the evidence admitted the note was the deed of the defendant, and must be so treated by the court, and the court erred in sustaining the demurrer, and rendering judgment for the defendant. *Id.*

6. A party in possession of a promissory note by assignment must be the owner. *Kelley v. Ford*, 140.

7. When the note is assigned before maturity, such assignment is prima facie evidence, that the note was received by the holder, upon a sale, in the usual course of business. *Id.*

8. Whatever may be the state of facts as to the consideration paid by the maker and payee, there is no presumption against the holder that he paid a valuable consideration for the note; and a jury will not infer any evidence of fraud or want of consideration, between the maker and the holder, from the fact that the note was assigned after maturity, or that it was paid for it by the holder. *Id.*

9. The assignment itself imports a consideration, and until the contrary is rebutted, the holder need offer no other proof.

10. Where the maker of a promissory note claims that the note, with notice of fraud, or want of consideration in its issue, notice must be proved; and the assignee cannot be charged with any want of diligence on his part, in ascertaining the facts, fraud or want of consideration, even when he is in a situation where the facts could be ascertained by inquiry. *Id.*

11. Where there is a sufficient defence, as between the payee and the maker of a promissory note, the innocent holder cannot be called upon to show when, or upon what consideration, the note was transferred to him, or where it came into his hands, until after something has been shown to impeach his possession. *Id.*

12. Where suit is brought on a promissory note in the name of the holder, to which the defendant pleads fraud and the want of consideration, the burden of showing the fraud and the want of consideration, and that the holder is not a bona fide holder of the note, for a valuable consideration, rests upon the defendant. *Id.*

13. Where in an action by the indorsee of a promissory note, the court instructed the jury, "that if the indorser was released, by want of notice of non-payment, still, that he subsequently promised to pay the note, he could be held liable," where it was insisted in the Supreme Court, that the instruction was qualified, by informing the jury that such promise, in the mouth of the indorser, must have been made with the knowledge that he had no money, and where there was nothing in the record to show that the indorser was asked or insisted on at the trial; *Held*, 1. That while the court have more fully stated the law, with the qualification insisting that the word *promise* its proper legal signification, there is no probability that the jury was misled by the instruction, to the disadvantage of the appellant; 2. That the party having failed to ask for a qualified instruction of the court, below could not make the error in the instruction a ground of complaint in the appellate court. *Ault v. Sloan*, 141.

14. Where in an action by the indorsee of a promissory note, the defendant to one E., who, by his attorney in fact, one S., came to the plaintiff, the defendant pleaded that the note was made by the plaintiff, but of said S., which was denied by the replication; on the trial of the cause, the plaintiff offered said note in evidence, upon the attorney of defendant asked to inspect the same, and it was handed to him; and where the said attorney (who was for one L.), then handed the note to the sheriff, who was

held an execution against S., in favor of L., with instructions, to levy upon the same as the property of said S., which was accordingly done by the sheriff, and he then took said note into his possession; and where the plaintiff moved for a rule on the sheriff to deliver up said note, that it might be given in evidence on said trial, which rule the court refused to make, but permitted said plaintiff, against defendant's objection, to introduce copies of said note, and the assignment, properly proven; *Held*, 1. That the court erred in refusing the rule, requiring the sheriff to surrender the note; 2. That secondary evidence of the note and assignment was rendered necessary by the wrongful act of defendant; and that if its admission was erroneous, the defendant could not take advantage of the error. *Lehman v. Cobb*, 534.

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4. Where it does not appear from a recognizance, that it was taken or accepted as a valid undertaking, by a court or magistrate of competent authority,

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it does not become a part of the record, and no judgment against the obligors for the penalty contained therein. *Ib.*

5. A recognizance in a criminal case, not capital, cannot *cedeas* on writ of error, unless allowed by a judge of the provided by section 3090 of the Code; and without such of the District Court, under section 3230, possesses no power nizeance. *The State v. McCloskey*, 496.

6. Section 3094 requires that the supreme judge ordering ings shall make the order, and prescribe the conditions ance. *Ib.*

7. The recognizance, or a copy of it, should be returne Court, with the record of the case; and that court, where th and remanded, should make an order concerning the future charged, answering to the condition of his undertaking. *I*

8. Where *scire facias* on a recognizance alleged that c convicted under an indictment for defacing a school-house pay a fine of one hundred dollars; that H. sued out a wr was ordered that the defendant be held to bail in the su dollars, with sureties for an equal amount, for his appear fendant and one C. came into open court, with the said H., edged themselves to owe and be indebted to the State of l condition of the recognizance was as follows: "Now, if th out a writ of error to the Supreme Court, and prosecute th said court, and obey the requisitions, order or judgment (premises, then the above obligation to be void;" that the sa District Court was rendered, and it was ordered that fur had in the District Court, not inconsistent with the opinio Court; that a writ of *procedendo* issued accordingly comm ceedings, as if no judgment had been rendered, or writ that afterwards, at the May term, 1855, the said H., t solemnly called, came not, and the court ordered that his c ises be entered; and where the defendant answered, denyin out a writ of error; and averring that there was no law cognizance; that there was no requisition, order or judgm Court, that H. was called upon to obey; and that H. had dition of his recognizance; and where, on the trial, the f dence the writ of *procedendo*, which contained no special H., but is in the usual form, which was all the evidence State; and where the defendant proved by the clerk of that there was no writ of error in that cause, on file in his upon this evidence, the court found for the State, and) against the defendant; *Held*, 1. That the *scire facias* did) evidence show any breach of the condition of the recogni judgment below was erroneous. *Ib.*

RELEASE.

1. In an action on an implied assumpsit against several *prosequi* as to a part of the defendants, is not regarded as s and therefore, it does not operate to discharge the other de *v. Merrill et al.*, 475.

REPLEVIN.

1. Replevin may be sustained on the right of possession out reference to the ownership or right of property. *McC*

2. Where in an action of replevin, the plaintiff asked th the jury as follows: "1. That it is not necessary in replev

4. An indictment which charges that the defendant "willfully obstructed the public road (describing it) contrary to law," sufficiently avers that the act charged was unlawfully done. *Capps v. The State*, 502.

5. Where an indictment for obstructing a public road described the road as follows: "The public road or highway leading from Fort Dodge to Fort Des Moines, Iowa, on the east side of the Des Moines river, lying and being in Boone township, Boone county, Iowa;" *Held*, That the road was sufficiently described in the indictment. *Ib.*

SCIRE FACIAS.

1. A *scire facias* is the proper mode of proceeding to revive a judgment, and must be brought in the county where the judgment was obtained. *Carnes v. Crandall*, 151.

2. In proceedings against bail on *scire facias*, the burden of proof is on the defendant, to show cause why the recognizance should not be estreated. *The State of Iowa v. Carr*, 289.

3. The execution of the recognizance will be taken as proved, unless denied under oath. *Ib.*

4. Where in a proceeding on *scire facias* to estreat a recognizance, it appeared from the record, that the warrant for the arrest of the principal was issued March 5, 1855; that the recognizance was dated May 25, 1855; and filed with the clerk of the District Court, June 7, 1855; and that the affidavit of the bail, that he possessed the qualifications prescribed by the statute for bail, was indorsed on the recognizance; and where it did not appear from the record, by whom the recognizance was taken or accepted; or that the party accused was under arrest, or required to give bail; or that the amount of the bail had been fixed by the court; or, if the recognizance was taken by a justice of the peace, that he had authority to take it; *Held*, 1. That no such connection was shown to exist between the indictment against the principal, and the recognizance declared on, as would authorize the court to infer that it was part of the record in that cause; or, if so, that it was rightfully a part of it; 2. That the affidavit of the bail as to his qualifications, indorsed on the recognizance, was not sufficient to give vitality and effect to the recognizance, or to show that it was ever taken or accepted as a valid undertaking, by a court or magistrate, of competent authority. *Ib.*

5. Where a *scire facias* on a recognizance alleged that one H. having been convicted under an indictment for defacing a school-house, was sentenced to pay a fine of one hundred dollars; that H. sued out a writ of error; that it was ordered that the defendant be held to bail in the sum of one hundred dollars, with sureties for an equal amount, for his appearance; that the defendant and one C. came into open court, with the said H., and each acknowledged themselves to owe and be indebted to the state of Iowa, &c.; that the condition of the recognizance was as follows: "Now, if the said H. shall sue out a writ of error to the Supreme Court, and prosecute the same to effect in said court, and obey the requisitions, order or judgment of the same, in the premises, then the above obligation to be void; "that the said judgment of the District Court was rendered, and it was ordered that further proceedings be had in the District Court, not inconsistent with the opinion of the Supreme Court; that a writ of *procedendo* issued accordingly, commanding further proceedings, as if no judgment had been rendered, or writ of error sued out; that afterwards at the May term, 1855, the said H., though three times solemnly called, came not, and the court ordered, that his default in the premises be entered; and where the defendant answered, denying that H. had sued out a writ of error; and averring that there was no law authorizing the recognizance; that there was no requisition, order or judgment of the Supreme Court, that H. was called upon to obey; and that H. had performed the condition of his recognizance; and where on the trial, the State offered in evi-

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copy at his sleeping room, over the store of R. S. A., by or attorneys, this 13th day of April, 1855—the above-named fourteen years of age, and being a member of the family where at the term of the District Court to which the motion the defendant appeared specially, and moved to set aside motion was overruled by the court; *Held*, 1. That the return not showing that the house of E. E. G. was the usual place of the defendant, and that Mrs. G. was a member of the family, That the court erred in overruling the motion. *Conversum*, 158.

2. Where an original notice is served by leaving a copy of residence of the defendant, the return must show to whom the copy is left, is a member of the same family. *Ib.*

3. Where a defendant, at the first term after the coming after his motion to quash the return on the original notice insufficiency, has been overruled, filed his answer, and applied for a continuance; and where, at the second term, the cause was set aside to afford time to obtain the sworn reply of the plaintiff, defendant; and where, at the third term, the cause was set aside rendered against the defendant; and where the defendant appealed to the Supreme Court, assigned for error the decision of the court on motion to quash the return on the original notice; *Held*, That had been driven into a trial at the first term, he would have raised the question as to the sufficiency of the return, in that but that having had, to prepare for trial, more than all the time obtained ordinarily, had the service been held insufficient motion to quash the return was an error that worked no injury, and of which he could not complain in the appellate.

RIPARIAN OWNER.

1. The proprietor of land upon the bank of, and adjacent to a river, does not own to the middle of the main channel of the river, but to high-water mark only. *Haight v. The State*.

2. Such proprietor owns to the edge of the bank of the river, the bed of the river belongs to the public. *Ib.*

ROAD.

1. An order of the county court establishing a road, is not the rights of any person, as distinguished from the public, allowed by law, from such an order. *Myers v. Simms*, 500.

2. A writ of *certiorari* is the proper method of trying the validity of the proceedings of the county court in establishing a road.

3. Where the plaintiff and twenty-one other persons sought the establishment of a road, and upon the coming in of the commissioners appointed to examine as to its expediency, the defendant and nine other persons remonstrated against its being established, the defendant claimed compensation for the damages he would sustain if the road was opened, which were assessed by appraisers, and paid to him; and where the county court, after hearing the parties, ordered the road to be established and worked as other roads, from which the defendant appealed; and where the District Court dismissed the appeal on ground that the defendant had no such interest in the subject-matter of the county court, as authorized him to take the appeal, the appeal was properly dismissed. *Ib.*

father to this state, and in 1854, was married to her present husband; that while she resided in Illinois, she was unmarried and single; that she did not marry until after her removal to Iowa as aforesaid; and that in June, 1856, the female defendant, spoke and published of and concerning the said R. T., in the presence of certain persons, (the persons to whom said words were spoken having knowledge that said R. T. was unmarried while in said state of Illinois,) the following words: "R. T. had a child in Illinois, and it was buried, and the tale was buried with it. It (alluding to a child of the said R. T. born after marriage) is not the first one she has had. She had one in Illinois, and it was buried, and the tale was buried with it. You (meaning the persons in hearing) would believe it, if you were to hear Sarelda Rawlins tell it;" *Held*, That the words were actionable *per se*. *Id*.

5. In slander, the material inquiry is, what is the plain and natural import of the language used, and how was it understood, and what idea was it adapted to convey to those who heard it? *Wilson v. Beighler & Wife*, 427.

6. To say of a woman, that she had given birth to a child, without any explanatory averments, as that she was an unmarried woman, at the time of the alleged birth of the child, or that the persons to whom the words were spoken, had knowledge of that fact, or that the hearers understood the language used, as conveying a charge of bastardy, or imputed a want of chastity, are not actionable *per se*. *Id*.

7. Where in an action for slanderous words, the petition alleged, that "the plaintiff hitherto being, and still is, an unmarried female, of good character and standing in society, never having been guilty of any act of indecency, or deviated from the true path of chastity, the female defendant, on the 15th day of July, 1854, and on divers days since, and in the presence and hearing of divers good citizens, wickedly, falsely and maliciously, with intent to injure the reputation and standing of the plaintiff, spoke and published of and concerning the plaintiff, the false, scandalous and defamatory words following: 'She (meaning the plaintiff,) had a child in Indiana,' thereby meaning that she, the plaintiff, had been delivered of a bastard child, and was an unchaste woman," which petition was demurred to, and the demurrer sustained by the court: *Held*, That the demurrer was properly sustained. *Id*.

8. In slander, a plea of justification must confess the speaking of the words charged, and set forth such facts as fix upon the plaintiff the specific crime imputed to him by the words charged in the petition. *McClintock v. Crick*, 453.

9. Where, in an action for slander, for charging the plaintiff with stealing the chickens of defendant, the defendant answered as follows: "And for a further answer, defendant says, that the said plaintiff, either in person or through his children, and with plaintiff's knowledge and consent, did kill, take and carry away, and appropriate to his own use, chickens belonging to defendant;" *Held*, That the answer was bad, as a plea of justification. *Id*.

10. Where the slanderous words charged, were spoken through heat of passion, or under excitement produced by the immediate provocation of the plaintiff, such facts may be shown in mitigation of damages, under our practice, without alleging them specifically in the answer. *Id*.

11. Where in an action of slander, the defendant pleaded, that the words charged, if spoken by him, were spoken at a time when the plaintiff was speaking and uttering false and scandalous words about defendant, (setting out the words,) and at a time when defendant was angry and in a passion, occasioned by the speaking of said false and scandalous words by the plaintiff, which was demurred to, and the demurrer sustained; *Held*, That there was no error in sustaining the demurrer. *Id*.

12. However much passion, produced by the provocation of the plaintiff, may operate to mitigate the damages in an action of slander, it cannot wholly defeat the plaintiff's action. *Id*.

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2. It is the province of the court alone to examine the any of the allegations are to be taken as true, for want of nial, to so state to the jury. *Ib.*

3. Where in an action for work and labor performed, the d admitting the number of days claimed, but denying that ti worth the sum of two dollars per day, and alleged that in parties disagreeing as to the price, had a settlement, at w that the defendant should pay the plaintiff \$1.37 1-2 per should pay one-half of the sum so found due within two we and the other half in May then next following; and where alleged, that the defendant paid to the plaintiff twenty c week, which the plaintiff received, and that in twelve da ment, he tendered to the plaintiff twenty-six dollars, the l then due, which balance he pays into court; and where ti denying the settlement and agreement, and the payment an money, and also pleaded that the agreement was withou which the defendant rejoined that there was a good and val for the agreement; and where the court instructed the jury plaintiff commenced his action for compensation, the parti upon the amount due, and fixed the time when payment shc an agreement is to be considered an account stated, and is v 1. That the answer of the defendant was not a plea of acco but a plea of an account stated as the amount to be paid, ment as to the time of payment. 2. That the agreement w in its character. *Cool v. Stone*, 219.

4. The principle that an agreement, without considerati sum than is due in discharge of the debt, cannot be pleaded tion for the whole debt, does not apply to cases where the i dated. *Ib.*

5. If it is claimed that the law of the place of contract, unknown to our law, such foreign law should be proven, ar in proof, should be properly averred or set out in the p *Briggs & Felthouser*, 464.

6. If a party would introduce proof of the laws of a for sufficient to aver, as a plaintiff, that his right to recover i law or statute of another state, where the contract was m cient for the defendant to aver, that the plaintiff cannot re the provisions of such foreign statute; but he must plead t ute relied upon, and set it out as he would any other fact i court may be able to see and judge, whether the proceedir the defence tenable, under such law.

7. The system of pleading and practice introduced by plates plainness of averment, and a clear and logical stateme ter relied upon for a recovery or defence, with even more was necessary under the common-law practice. *Ib.*

8. In actions *ex contractu*, as well as in those *ex delicto*, the a *nolle prosequi* as to a part of the defendants, when they i and plead matter going to their personal discharge. *Q al.*, 475.

9. So, when they simply sever in their pleas, without lo of the plea. *Ib.*

10. Allegations in a pleading, not responded to, must *Plummer v. Roads*, 587.

POSSESSION.

1. There may be possession *in fact* of unimproved an *Langworthy v. Myers et al.*, 18.

the jury, that "it devolved on the plaintiff to show affirmatively, that he had complied with the law of Illinois, and exhausted his remedy against the makers of said certificate, and there being no allegation nor proof of the institution of a suit against the maker, nor of the insolvency of the Phoenix Bank, they should find for the defendant;" *Held*, That the evidence was improperly admitted, and that the instructions were erroneous. *Ib.*

STATUTE OF FRAUDS.

1. No evidence of any contract for the creation or transfer of any interest in real estate, is competent, unless it be in writing, and signed by the party sought to be charged, or his agent. *Holland et ux. v. Hensley et al.*, 222.

2. Equity, as well as the law, contemplates that all contracts relating to real estate, shall be evidenced by some writing, signed by the party to be charged; and when it is sought to bring a case within any of the exceptions allowed to avoid the operation of the statute of frauds, the court should never be left to act upon conjecture, or upon proof loose and indeterminate in its character. *Williamson v. Williamson*, 279.

3. Where a party seeks to take a cause out of the operation of the statute of frauds, upon the ground of a part performance, it is indispensable that the parol contract, agreement or gift, should be established by clear, unequivocal and definite testimony; and the acts claimed to have been done under the contract, should be equally clear and definite, and referable exclusively to the contract or gift. *Ib.*

STEAMBOAT.

1. The seizure and sale of a steamboat under the laws of the state of Missouri, will not divest the lien of a citizen of the state of Iowa, for supplies furnished such boat, while navigating the waters of this state. *Haight & Bro. v. Steamboat Henrietta*, 472.

2. Where an action against a steamboat to enforce a lien for supplies furnished, it appeared that the articles were furnished to said boat in the fall of 1855, in the city of Keokuk and state of Iowa; that afterwards, on the 20th of November, 1855, said boat was seized under a warrant, at the suit of D. and others, under the laws of the state of Missouri, for an indebtedness contracted while navigating the waters of that state; that under an order of court in Missouri, the sheriff, on the 22d of December, 1855, sold the said boat with all her tackle, fixtures and furniture to one M., who is still the owner, and who defends this suit; and that the notice of the suit of D. and others was limited to creditors having liens against said boat under the laws of Missouri, which laws excluded non-resident creditors, or those having debts contracted out of the state; *Held*, That the lien of the plaintiff was not destroyed by the proceedings in Missouri, and that the boat was liable. *Ib.*

TOWN PLAT.

1. Where the plat of a town, situate on the Mississippi river, duly acknowledged and recorded, declared that "all the streets and alleys shall be and remain public highways forever, *except Water street*," and certain alleys named, which plat was signed by G., "for himself and others," and where in a subsequent suit for partition between the owners of the town, the commissioners, in their report, adopted in the main the plan of the town as laid out by said plat, in respect to the blocks, lots and streets, and did not except any of the streets from the effect of the dedication as public highways; and in speaking of share eighty of the town, in which is the lot of complainant, the report says: "All the town lots included in the above share are bounded by the middle of the streets and alleys on which they are situate," and of those next

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ment is rendered on the finding, the plaintiff may amend his showing the representative capacity in which he sues, upon a court may impose. *Ib.*

3. Where the allegations in a petition for an attachment where they are improperly alleged, they are to be reached by at the writ of attachment. *Ib.*

4. Where a question of fact is tried by the court, and it reduced to writing, under section 1793 of the Code, the appeal review the finding of the court on such question, as on a trial, on the ground that the verdict is against the evidence warrant such review, all the evidence on which the finding was had, must be before the appellate court. *Danforth, Davis & May*, 230.

5. Where there is a motion for a new trial upon some ground up the evidence, the appellate court looks into that evidence up but it cannot review the finding of the court below, or of a verdict, on errors assigned thereon. *Bowen & King v. Hale*,

6. A set-off is not a defence to an action, and should separately. *Ib.*

7. When the answer or replication of a party, is required to oath, as to any matter stated in the previous pleadings, and such answer or replication is evidence conclusive, in favor of the same, as to the matters of fact about which the opposing disclosure, unless it is overcome by the testimony of two witnesses, corroborated by other circumstances and facts, which testimony a greater weight than such answer or replication equivalent in weight to one witness. *Bacon v. Lee & Gray*,

8. A replication under oath, which neither admits nor denies in the pleading to which it is a reply, and in which the party alleges that he possesses no knowledge, and has no means of to such facts, and calls upon the opposing party to prove the answer, is no testimony upon the facts in controversy, and the same effect as the testimony of a witness. *Ib.*

9. A replication under oath to matter stated in the answer such reply was called for, is not evidence for the party making cation. *Ib.*

10. Where, after a change of venue is ordered, the adverse re-docket the cause, and the party taking the change, makes an appears by his attorneys, and proceeds to the trial of the cause assign for error in the appellate court, the decision of the court the cause. *Eckles v. Kenny*, 539.

11. Where a plaintiff dismisses his suit, he is liable for all made in the case, and not alone for those that may be taxed if suit is dismissed. *Acres v. Hancock*, 568.

12. A plaintiff cannot, by dismissing his suit, and paying return of the writs and process in the hands of the officer, avoid of the costs made thereon. *Ib.*

13. Where a transcript from a justice of the peace, does amount of the costs in the case, the District Court may require certify to that court, the amount of such costs. *Ib.*

14. If a party desires to have the appellate court review the District Court, in sustaining or overruling a demurrer, he must in chief to be rendered in that court, on the demurrer. *Pine* 587.

PRACTICE IN CHANCERY CASES.

1. Where there are several respondents to a bill in equity, against whom the same claim to relief is made, some of whom deny the right of the complainant to the relief sought, while others allow defaults to be entered against them, the complainant is not entitled to a decree against those in default, unless he establishes his right to the relief prayed for against those who have appeared. *Pierson v. David et al.*, 410.

2. A complaint in Chancery is required to satisfy the chancellor that he is entitled to relief, although there has been no appearance by the respondent. *Ib.*

3. If the proof made, shows a want of equity in the complainant's case, he must fail in his suit. *Ib.*

4. Where a creditor's bill was filed in September, 1854, which did not require the respondents to answer under oath, and the answer to which was not sworn to; and where, after the cause had been pending two or three terms, and over a year, the respondents asked and obtained leave to file an amended answer, in the nature of a plea, and on the 16th of June, 1856, filed an answer, consisting of the entire former one, with an addition setting up other matter, which amended answer was sworn to; *Held*, That the answer could not be treated as a sworn answer. *De France v. Howard et al.*, 524.

5. Where in a proceeding seeking the specific performance of a contract for the conveyance of land, a controversy arose in the Supreme Court, whether the complainant had in the District Court, introduced certain receipts (now lost) showing the payment of the purchase money; and where, upon the *ex parte* affidavits submitted by the parties, as to the fact in controversy, it was left in great doubt, whether such receipts had been produced and offered in evidence; *Held*, That the court might either determine the case upon the record and affidavits, or might, in the exercise of a sound discretion, remand the cause, for the purpose of having the District Court embody, in a proper bill of exceptions, the facts as to the proof made on the hearing. *Tasker v. Marshall*, 544.

6. Where a bill in chancery charges material facts, to be within the knowledge, and certain acts to have been done at the instigation, of the respondent, and the answer does not respond to such charges, such charges are to be taken as true. *Compton v. Comer*, 577.

7. A respondent in chancery cannot pray anything in his answer, except to be dismissed the court. *Ib.*

8. If he has any relief to pray, or discovery to seek, he must do so by a bill of his own, or he may make his answer a cross bill. *Ib.*

PRACTICE IN CRIMINAL CASES.

1. In criminal cases commenced before a justice of the peace, and appealed to the District Court, the affidavit for the appeal must be taken as the basis of the case in the District Court. *Garrettson v. The State*, 338.

2. If the facts alleged in the affidavit are not correctly stated, the prosecutor should cause the justice to certify the true state of the transaction. *Ib.*

3. On appeal to the District Court, in a criminal case, the record from the justice constitutes no part of the evidence, on the trial anew in the District Court. *Bryan v. The State*, 349.

4. A warrant of arrest in a criminal case, which follows substantially the form given in the Code, is legally sufficient. *Devine v. The State*, 443.

5. An information that follows the statute in every essential requisite, is sufficient. *Ib.*

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6. Where an information was subscribed and sworn to state of Iowa, Benton county:—I, James L. Pauly, being d and say, that I believe the matters and things set forth in the going information, are true," which was signed by the depon the jurat of a justice of the peace was attached; *Held*, Th was properly subscribed and sworn to. *Ib.*

7. Where a motion is made to dismiss an appeal in a criminal sufficiency of the affidavit of appeal, the facts stated in the taken as true. *Beckman v. The State*, 452.

8. If the State wishes to controvert the statements of the appeal, as to the testimony given on the trial before the justice be obtained requiring the justice to certify to the District Court the defence on the trial before him. *Ib.*

9. Where an affidavit for an appeal in a criminal case, sets against the defendant, and avers that the State has failed to lay in the information; that the judgment of the justice was contrary to the evidence; and that injustice has been done to the defendant to entitle the defendant to an appeal, and to have the judgment reversed, or, at least, to a new trial in the District Court.

10. Section 3094 of the Code, requires that the supreme court stay of proceedings, shall make the order, and prescribe the recognizance. *The State v. McCloskey*, 496.

11. The recognizance, or a copy of it, should be returned to the Court, with the record of the case; and that court, where the defendant is remanded, should make an order concerning the future proceedings, answering to the condition of his undertaking. *Ib.*

PRESUMPTION.

1. In the absence of any showing to the contrary, the presumption that there was sufficient evidence to authorize the judgment, and the proceedings were regular. *Brady v. Malona*, 146.

2. The appellate court will presume in favor of the regularity of proceedings of arbitrators. *McKinney v. The Western Stage Co.*

3. Where a judgment in a criminal case, rendered in the District Court, after adjudging that the State recover a fine of two hundred dollars, and that execution issue therefor, contained the following: "and that execution issue therefor, contained the following: further be it ordered, that the clerk make out a mittimus to the county, to confine the body of the prisoner in the Polk county space of six months;" *Held*, 1. That the judgment was irregular; that its meaning was, that the defendant be imprisoned for six months therein, besides paying the fine of two hundred dollars; 2. That it did not show that there was a sufficient jail in the county where the judgment was rendered, the presumption was in favor of the regularity of the court below, and the court could not say that directing the imprisonment of the defendant in a different county. *The State*, 554.

PROMISSORY NOTES.

1. Where an action was brought on three promissory notes, on account, to which the defendant answered, alleging that he had no account; that the promissory notes were signed by him as the owner only, for the benefit of St. M., who was the real debtor; that the larger of said notes was afterwards paid by St. M.; that the other two notes came into the hands of the plaintiff who obtained payment of them, by suit, judgment, and execution.

the plaintiff did not hold the notes in his own right, but as assignee of St. M., for the benefit of his creditors; to which the plaintiff replied, denying that the notes were given for the accommodation of St. M., and that he was the real debtor; denying that the two notes were paid by suit, &c.; and averring that no suit was ever commenced or judgment recovered against the defendant, prior to the commencement of this suit; and where it appeared that the plaintiff, St. M. and T. & H. resided in St. Louis; that St. M. had indorsed the two notes to T. & H., who commenced an action against the present defendant, as maker, and St. M. as indorser; that no service was had upon C., who was then residing at Dubuque; that T. & H. discontinued the action as against C. and took judgment against St. M.; and that execution issued on this judgment, which was returned satisfied; and where C. offered in evidence the transcript of the judgment against St. M., which was objected to, and the objection sustained; *Held*, That the judgment against St. M., constituted no defence for C., and was properly ruled from the jury. *Hunt v. Collins*, 56.

2. Where in action on three promissory notes, the defendant pleaded that the plaintiff held the notes as assignee of St. M., for the benefit of his creditors, and that the notes were accommodation notes for the benefit of St. M.; and where the defendant gave the plaintiff notice to produce the original assignment from St. M., which not being produced, the defendant claimed that such refusal raised the presumption that the assignment contained something that would defeat the plaintiff's right to recover, which view of the law, the court overruled; *Held*, That the neglect or refusal of the plaintiff to produce the original assignment, only had the effect to admit secondary proof; and that there was no error in the ruling of the court. *Ib.*

3. The fact that the words "ten per cent." in a promissory note, are written in a different ink from the body of the instrument, and from the signature of the maker, does not cast upon the note such suspicion, that the plaintiff, before he can offer it in evidence, is bound to show that the words were made by authority of the maker, or before the execution of the note. *Jones v. Ireland*, 63.

4. Whether a promissory note has been altered or not, is a question of fact for the jury, and not for the court. *Ib.*

5. Where in a proceeding to foreclose a mortgage, the petition alleged, that M. sold to the defendant, certain lands for \$1,800, and to secure the payment of the purchase money, and ten per cent. interest, defendant mortgaged the lands back to M.; and that three promissory notes were given, which the mortgage was intended to describe, one of which had been assigned to plaintiff, and was due and unpaid; and where the answer of the defendant admitted the purchase of the land, but denied that the notes were executed to bear ten per cent. interest; and where, after *oyer* of the note, the defendant denied its execution, under oath, and that it was his deed, upon which issue was taken by the plaintiff; and a jury was impaneled to try the issue of fact; and where the words "ten per cent.," in the note, were written in pale *blue* ink, while the body of the note, was written in pale *black* ink, and the signature of the maker in black ink of a different color from that of the body of the note, but there was no erasure or interlineation on the face of the note; and where the defendant objected to the note being given in evidence, and the court thereupon ruled, after an inspection of the note and mortgage, that there was sufficient on the face of the note, to cast a cloud upon it, which plaintiff must explain, before he could recover, and that the note might be given in evidence, by complying with this rule; and where the note and mortgage were then given in evidence, and read to the jury, and the defendant rested his case, without any attempt to comply with the rule laid down by the court, and thereupon the defendant demurred to the evidence, which demurrer was sustained, because the ruling of the court had not been complied with, and judgment rendered for the defendant; *Held*, 1. That there was nothing on the face of the note, requiring explanation by the plaintiff, in order to maintain his

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action: 2. That the demurrer to the evidence admitted the note was the deed of the defendant, and must be so the court erred in sustaining the demurrer, and rendering defendant. *Ib.*

6. A party in possession of a promissory note by assignment be the owner. *Kelley v. Ford*, 140.

7. When the note is assigned before maturity, such assignment, that the note was received by the holder, upon a question, in the usual course of business. *Ib.*

8. Whatever may be the state of facts as to the consideration made and payee, there is no presumption against the holder that he paid a valuable consideration for the note; and a jury will not infer evidence of fraud or want of consideration, between the maker and the holder, to infer that it was assigned after maturity, or that it was paid for it by the holder. *Ib.*

9. The assignment itself imports a consideration, and unless the consideration is rebutted, the holder need offer no other evidence.

10. Where the maker of a promissory note claims that the note, with notice of fraud, or want of consideration in fact, notice must be proved; and the assignee cannot be charged with notice by reason of any want of diligence on his part, in ascertaining the facts of fraud or want of consideration, even when he is in a situation where facts could be ascertained by inquiry. *Ib.*

11. Where there is a sufficient defence, as between the parties to a promissory note, the innocent holder cannot be called upon to show when, or upon what consideration, the note was transferred to him, until after something has been shown to impeach his possession. *Ib.*

12. Where suit is brought on a promissory note in the name of the defendant, who pleads fraud and the want of consideration, and shows that he is not a bona fide holder of the note, for a valuable consideration, the burden of proof, as to the alleged fraud, rests upon the defendant. *Ib.*

13. Where in an action by the indorsee of a promissory note, the court instructed the jury, "that if the indorser was released, by want of notice of non-payment, still, that he subsequently promised to pay the note, he could be held liable thereon," where it was insisted in the Supreme Court, that the instruction had been qualified, by informing the jury that such promise, in fact, must have been made with the knowledge that he was not a bona fide holder, and where there was nothing in the record to show that such promise was asked or insisted on at the trial; *Held*, 1. That while the court have more fully stated the law, with the qualification in giving the word promise its proper legal signification, there was no probability that the jury was misled by the instruction, to the disadvantage of the appellant; 2. That the party having failed to ask for a qualified instruction of the court, below could not make the error in the instruction a ground of complaint in the appellate court. *Ault v. Sloan*,

14. Where in an action by the indorsee of a promissory note, the defendant to one E., who, by his attorney in fact, offered the note to the plaintiff, the defendant pleaded that the note was not the property of the plaintiff, but of said S., which was denied by the plaintiff; on the trial of the cause, the plaintiff offered said note in evidence, and upon the attorney of defendant asked to inspect the same, it was handed to him; and where the said attorney (who was not one L.), then handed the note to the sheriff, who was

held an execution against S., in favor of L., with instructions, to levy upon the same as the property of said S., which was accordingly done by the sheriff, and he then took said note into his possession; and where the plaintiff moved for a rule on the sheriff to deliver up said note, that it might be given in evidence on said trial, which rule the court refused to make, but permitted said plaintiff, against defendant's objection, to introduce copies of said note, and the assignment, properly proven; *Held*, 1. That the court erred in refusing the rule, requiring the sheriff to surrender the note; 2. That secondary evidence of the note and assignment was rendered necessary by the wrongful act of defendant; and that if its admission was erroneous, the defendant could not take advantage of the error. *Leiman v. Cobb*, 634.

15. The alteration of a promissory note, with the assent of the maker, at the time of, or after, the alteration, does not render it void. *Gristead v. Briggs*, 559.

16. Where, in an action on a promissory note, by the indorsee, against the makers and indorser, it appeared from the evidence, that the note was made on the 29th of July, 1856, and was due on the first of November following; that the note, at the time of its execution, did not contain the words, "with ten per cent. interest;" that the words were inserted after the execution of the note, but by whom, or at what precise time, is not known; that before the maturity of the note, J., one of the makers, left the state, and was insolvent; that between the first and tenth of November, 1856, B., the other maker of the note, called upon the attorney of the plaintiff, for the purpose of getting the same to send to the residence of his co-maker, for payment; that the note was delivered to him, he giving a receipt therefor, at which time the note contained said specification as to interest; that B. recommended plaintiff to buy the note; that after B. knew of the alteration of the note, he instructed plaintiff's attorney, to bring suit thereon; and that he, at no time, before the commencement of the suit, made any objection to the alteration of the note; *Held*, That the assent of B. to the alteration might have been reasonably inferred, and that he was liable to pay the note. *Id.*

RECOGNIZANCE.

1. In proceedings against bail on *scire facias*, the burden of proof is on the defendant, to show cause why the recognizance should not be estreated. *The State of Iowa v. Carr*, 289.

2. The execution of the recognizance will be taken as proved, unless denied under oath. *Id.*

3. Where in a proceeding on *scire facias* to estreat a recognizance, it appeared from the record, that the warrant for the arrest of the principal was issued, March 5, 1855; that the recognizance was dated May 25, 1855; and filed with the clerk of the District Court, June 7, 1855; and that the affidavit of the bail, that he possessed the qualifications prescribed by the statute for bail, was indorsed on the recognizance; and where it did not appear from the record, by whom the recognizance was taken or accepted; or that the party accused was under arrest, or required to give bail; or that the amount of the bail had been fixed by the court; or, if the recognizance was taken by a justice of the peace, that he had authority to take it; *Held*, 1. That no such connection was shown to exist between the indictment against the principal, and the recognizance declared on, as would authorize the court to infer that it was part of the record in that cause; or if so, that it was rightfully a part of it; 2. That the affidavit of the bail as to his qualifications, indorsed on the recognizance, was not sufficient to give vitality and effect to the recognizance, or to show that it was ever taken or accepted as a valid undertaking, by a court or magistrate, of competent authority. *Id.*

4. Where it does not appear from a recognizance, that it was taken or accepted as a valid undertaking, by a court or magistrate of competent authority,

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it does not become a part of the record, and no judgment against the obligors for the penalty contained therein. *Ib.*

5. A recognizance in a criminal case, not capital, cannot *cedeas* on writ of error, unless allowed by a judge of the provided by section 3090 of the Code; and without such the District Court, under section 3230, possesses no power nize. *The State v. McCloskey*, 496.

6. Section 3094 requires that the supreme judge ordering ings shall make the order, and prescribe the condition ance. *Ib.*

7. The recognizance, or a copy of it, should be return Court, with the record of the case; and that court, where tl and remanded, should make an order concerning the future charged, answering to the condition of his undertaking. *Ib.*

8. Where *scire facias* on a recognizance alleged that convicted under an indictment for defacing a school-house pay a fine of one hundred dollars; that H. sued out a writ was ordered that the defendant be held to bail in the \$ dollars, with sureties for an equal amount, for his appearance and one C. came into open court, with the said H., edged themselves to owe and be indebted to the State of condition of the recognizance was as follows: "Now, if t out a writ of error to the Supreme Court, and prosecute t said court, and obey the requisitions, order or judgment premises, then the above obligation to be void;" that the District Court was rendered, and it was ordered that fur had in the District Court, not inconsistent with the opinion Court; that a writ of *procedendo* issued accordingly comm proceedings, as if no judgment had been rendered, or writ that afterwards, at the May term, 1855, the said H., solemnly called, came not, and the court ordered that his ises be entered; and where the defendant answered, denyi out a writ of error; and averring that there was no lav cognizance; that there was no requisition, order or judgm Court, that H. was called upon to obey; and that H. had dition of his recognizance; and where, on the trial, the dence the writ of *procedendo*, which contained no special H., but is in the usual form, which was all the evidence State; and where the defendant proved by the clerk of that there was no writ of error in that cause, on file in hi upon this evidence, the court found for the State, and against the defendant; *Held*, 1. That the *scire facias* did evidence show any breach of the condition of the recogn judgment below was erroneous. *Ib.*

RELEASE.

1. In an action on an implied assumpsit against sever *prosequi* as to a part of the defendants, is not regarded as and therefore, it does not operate to discharge the other d *v. Merritt et al.*, 475.

REPLEVIN.

1. Replevin may be sustained on the right of possessio out reference to the ownership or right of property. *McC*

2. Where in an action of replevin, the plaintiff asked t the jury as follows: "1. That it is not necessary in reple

should prove that he is the rightful owner of the property replevied. If he had the peaceable possession, his right of possession was good against every person but the real owner, or some one having a better right of possession. 2. That if the plaintiff had possession of the property, his right of possession is good against all persons, until a better right is proved by some other person," which instructions the court refused to give; *Held*, That the court erred in refusing to give the instructions. *Ib.*

REPLICATION.

1. Where usury is pleaded as a defence, and the plaintiff is called upon to reply under oath, as to the usury, such sworn replication does not render the defendant incompetent to testify as to the usury. *Bacon v. Lee & Gray*, 490.

2. When the answer or replication of a party is required to be made under oath, as to any matter stated in the previous pleadings, and responsive to it, such answer or replication is evidence conclusive, in favor of the party making the same, as to the matters of fact about which the opposite party seeks a disclosure, unless it is overcome by the testimony of two witnesses, or by one witness, corroborated by other circumstances and facts, which give to such testimony a greater weight than such answer or replication, or which are equivalent in weight to one witness. *Ib.*

3. A replication under oath, which neither admits nor denies the facts stated in the pleading to which it is a reply, and in which the party making it alleges that he possesses no knowledge, and has no means of knowledge, as to such facts, and calls upon the opposing party to prove the facts stated in the answer, is no testimony upon the facts in controversy, and cannot have the same effect as the testimony of a witness. *Ib.*

4. A replication under oath to matter stated in the answer, as to which no such reply was called for, is not evidence for the party making such replication. *Ib.*

RES ADJUDICATA.

1. No matter can be pleaded as *res adjudicata*, which was not covered by, or embraced in, the pleadings of the former suit. *Haight v. The City of Keokuk*, 199.

2. Matters which arise only incidentally, however much they may influence the mind of the judge or jury in arriving at a conclusion, are not matters adjudicated. *Ib.*

3. In order to make the judgment in the former action a bar to the latter, it must appear that the subject matter of the two actions are the same. *Ib.*

4. Before a prior judgment can be a bar to a subsequent action, the point or matter in issue between the parties, must have been *determined*, and such determination or decision must have been upon the merits. *Delany v. Reade*, 292.

5. If a suit shall be discontinued, or a plaintiff shall become nonsuit; or if, for any other cause, there has been no judgment of the court upon the matter in issue, the proceedings are not conclusive, and will not bar a subsequent suit for the same cause of action. *Ib.*

RETURN.

1. Where the return to an original notice read as follows: "Served the within notice on the within named F. H. W., by leaving a true copy with E. H. T., he being over fourteen years of age, at the banking house of G. T. & Co., being the place of business of the defendant. Also, a copy with Mrs. G., at defendant's boarding house, being the residence of E. E. G. And also, a

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copy at his sleeping room, over the store of R. S. A., by one of the attorneys, this 13th day of April, 1855—the above-named defendant being fourteen years of age, and being a member of the family where at the term of the District Court to which the cause was removed the defendant appeared specially, and moved to set aside the motion was overruled by the court; *Held*, 1. That the return was not showing that the house of E. E. G. was the usual place of residence of the defendant, and that Mrs. G. was a member of the family. That the court erred in overruling the motion. *Consequenter*, 158.

2. Where an original notice is served by leaving a copy at the residence of the defendant, the return must show to whom the copy is left, is a member of the same family. *Id.*

3. Where a defendant, at the first term after the coming on of his motion to quash the return on the original notice of insufficiency, has been overruled, filed his answer, and appeared at the second term, and where, at the second term, the cause was continued to afford time to obtain the sworn reply of the plaintiff, and where, at the third term, the cause was rendered against the defendant; and where the defendant appealed to the Supreme Court, assigned for error the decision of the court on the motion to quash the return on the original notice; *Held*, 1. That the defendant had been driven into a trial at the first term, he would have been able to raise the question as to the sufficiency of the return, in that he had, to prepare for trial, more than all the other defendants obtained ordinarily, had the service been held insufficient. That the motion to quash the return was an error that worked no injury, and of which he could not complain in the appellate court.

RIPARIAN OWNER.

1. The proprietor of land upon the bank of, and adjacent to, a river, does not own to the middle of the main channel of the river, but to high-water mark only. *Haight v. The State*.

2. Such proprietor owns to the edge of the bank of the river, the bed of the river belongs to the public. *Id.*

ROAD.

1. An order of the county court establishing a road, is not the rights of any person, as distinguished from the public, and is not allowed by law, from such an order. *Myers v. Simms*, 501.

2. A writ of *certiorari* is the proper method of trying the validity of the proceedings of the county court in establishing a road.

3. Where the plaintiff and twenty-one other persons petitioned for the establishment of a road, and upon the coming in of the commissioners appointed to examine as to its expediency, the defendant and nine other persons remonstrated against its being established, and the defendant claimed compensation for the damages he would sustain if the road was opened, which were assessed by appraisers, and paid to the defendant; and where the county court, after hearing the parties, ordered the road to be established and worked as other roads, from which the defendant appealed; and where the District Court dismissed the appeal on the ground that the defendant had no such interest in the establishment of the road, as authorized him to take the appeal; the order of the county court, as authorized him to take the appeal, was properly dismissed. *Id.*

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dence the writ of *procedendo*, which contained no special but is in the usual form, which was all the evidence on and where the defendant proved by the clerk of the Dis was no writ of error in that cause on file in his office; evidence, the court found for the State, and rendered defendant: *Held*, 1. That the *scire facias* did not allege any breach of the condition of the recognizance; 2. That the law was erroneous. *The State v. McCloskey*, 496.

SERVICE.

1. Where an original notice is served by leaving a copy at the residence of the defendant, the return must show to whom the copy is left is a member of the same family. *Converse, Admr. v. Warren*, 158.

2. The words, "the family," in section 1721 of the Code, which the party on whom the service is made is a member of.

3. Where a defendant has taken objection to the defect in the proper time and manner, and his objection is required to plead to the action, he does not waive or lose that objection, by appearing and pleading. (*WRIGHT, C. J., dissenting*).

4. Such an appearance must be considered to have been taken, and subject to the exception taken to the decision of the court as to the sufficiency of the service. *Id.*

SET-OFF.

1. A set-off is not a defence to an action, and should be pleaded. *Bowen & King v. Hale*, 430.

SETTING OUT FIRE.

1. Where a party willfully, carelessly, or negligently sets fire to, and consumes another's property, he is liable for the damage resulting from his act; and it is not necessary, in order to the act should have been done, with intent to injure the plaintiff. *Jacobs v. Andrews*, 506.

2. Where in an action for setting out fire, by which the plaintiff was injured, the court instructed the jury as follows: "That the defendant should conclude, from the testimony, that defendant set out fire, yet, unless they believe that he set out the same, willfully or negligently, and with intent to injure the plaintiff, the defendant is not liable." *Held*, That the instruction was erroneous. *Id.*

SLANDER.

1. To call a woman a "whore," is actionable of itself as special damage. *Smith v. Silence*, 321.

2. Words imputing to a female, a want of chastity, are not a proof of special damages. *Truman & Wife v. Taylor*.

3. The words are to be taken in their plain and natural meaning according to the sense in which they appear to have been adapted to convey, to those to whom they were spoken.

4. Where in an action for speaking slanderous words, that R. T., (the female plaintiff,) in the year 1852, was married with her father in the state of Illinois; that in 1853, she

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13. Where in an action of slander, the court refused that if the words were spoken by defendant, through he by harsh and abusive words used by plaintiff towards words are not actionable, and they must find for defendant instruction was properly refused. *Ib.*

14. In an action of slander, it is sufficient to prove substantially. *Ib.*

15. And where in such an action, the court instructed not necessary for the plaintiff to prove the precise words as but that it was sufficient to prove them substantially, as that the instruction was correct. *Ib.*

SPECIFIC PERFORMANCE.

1. In order to enforce the performance of a parol contract conveyance of real estate, the existence of the contract as shown, and that the vendee, either paid a part of the took possession of the land, under the contract. *F. et al.*, 570.

STATUTES.

1. Chapter four of the Code, was intended to save all duties and rights, until they were duly superseded under that statute. *Wade v. Carpenter et al.*, 361.

2. The sixth section of the act of July 30, 1840, which of the statutes of Great Britain shall be considered as law Iowa, does not extend to the statutes of England, and prescribe the event of the union of the crown of England was as the period at which the statutes of England should cease our law. *O'Ferrall v. Simplot*, 381.

3. The statute of Merton, (20 Henry III, A. D. 1236,) which creates damages for the detention of her dower, was not destroyed by section six of the act of July 30, 1840. *Ib.*

4. The courts of Iowa will not take judicial notice of the another state. *Bean v. Briggs & Felthouser*, 464.

5. If a party would introduce proof of the laws of a foreign state sufficient to aver, as a plaintiff, that his right to recover is under law or statute of another state, where the contract was sufficient for the defendant to aver, that the plaintiff is reason of the provisions of such foreign statute; but he must aver that the statute relied upon, and set it out, as he would any other that the court may be able to see and judge, whether warranted, or the defence tenable, under such law. *Ib.*

6. Where in an action by the indorsee against the indorser of deposit, made in Illinois, by the Phoenix Bank of Chicago, the defendants answered, averring as follows: "And defendant denies that plaintiff has any cause of action against him, because he contract was made and entered into in the state of Illinois, a Iowa. And defendant denies that plaintiff has exhausted his maker of said certificate," and where, on the trial, the evidence, a printed copy of the statute of Illinois, for the that, under said law, it was the duty of plaintiff to attend to the demand from the maker, by the institution of legal proceedings, in consequence of the maker's insolvency, was availing, which evidence was objected to by the plaintiff, was overruled, and the evidence admitted; and where it

the jury, that "it devolved on the plaintiff to show affirmatively, that he had complied with the law of Illinois, and exhausted his remedy against the makers of said certificate, and there being no allegation nor proof of the institution of a suit against the maker, nor of the insolvency of the Phoenix Bank, they should find for the defendant;" *Held*, That the evidence was improperly admitted, and that the instructions were erroneous. *Id.*

STATUTE OF FRAUDS.

1. No evidence of any contract for the creation or transfer of any interest in real estate, is competent, unless it be in writing, and signed by the party sought to be charged, or his agent. *Holland et ux. v. Hensley et al.*, 222.

2. Equity, as well as the law, contemplates that all contracts relating to real estate, shall be evidenced by some writing, signed by the party to be charged; and when it is sought to bring a case within any of the exceptions allowed to avoid the operation of the statute of frauds, the court should never be left to act upon conjecture, or upon proof loose and indeterminate in its character. *Williamson v. Williamson*, 219.

3. Where a party seeks to take a cause out of the operation of the statute of frauds, upon the ground of a part performance, it is indispensable that the parol contract, agreement or gift, should be established by clear, unequivocal and definite testimony; and the acts claimed to have been done under the contract, should be equally clear and definite, and referable exclusively to the contract or gift. *Id.*

STEAMBOAT.

1. The seizure and sale of a steamboat under the laws of the state of Missouri, will not divest the lien of a citizen of the state of Iowa, for supplies furnished such boat, while navigating the waters of this state. *Haight & Bro. v. Steamboat Henrietta*, 472.

2. Where an action against a steamboat to enforce a lien for supplies furnished, it appeared that the articles were furnished to said boat in the fall of 1855, in the city of Keokuk and state of Iowa; that afterwards, on the 20th of November, 1855, said boat was seized under a warrant, at the suit of D. and others, under the laws of the state of Missouri, for an indebtedness contracted while navigating the waters of that state; that under an order of court in Missouri, the sheriff, on the 22d of December, 1855, sold the said boat with all her tackle, fixtures and furniture to one M., who is still the owner, and who defends this suit; and that the notice of the suit of D. and others was limited to creditors having liens against said boat under the laws of Missouri, which laws excluded non-resident creditors, or those having debts contracted out of the state; *Held*, That the lien of the plaintiff was not destroyed by the proceedings in Missouri, and that the boat was liable. *Id.*

TOWN PLAT.

1. Where the plat of a town, situate on the Mississippi river, duly acknowledged and recorded, declared that "all the streets and alleys shall be and remain public highways forever, *except Water street*," and certain alleys named, which plat was signed by G., "for himself and others," and where in a subsequent suit for partition between the owners of the town, the commissioners, in their report, adopted in the main the plan of the town as laid out by said plat, in respect to the blocks, lots and streets, and did not except any of the streets from the effect of the dedication as public highways; and in speaking of share eighty of the town, in which is the lot of complainant, the report says: "All the town lots included in the above share are bounded by the middle of the streets and alleys on which they are situate," and of those next

the river, says: "and those upon Water street, include a of them to the Mississippi river;" which report was adopted a decree rendered in accordance therewith: *Held*, 1. That far as it was adopted by the report of the commissioners: came of force; 2. That the report and decree placed W same ground, as to publicity, with the other streets; 3. were dedicated as highways, and are public; 4. That the street, on the plat, from the dedication, was void for repug lot owners owned the soil to the middle of the streets and : public right to the use, control and management of the h owners of lots fronting on the Mississippi river own the river, subject to the public easement; 7. That Water str river bank, and was not limited in width to the dotted l said plat. *Haight v. The City of Keokuk*, 199.

1. Where in an action of trespass, charging the cattle of breaking into the plaintiff's close and destroying his crops, finding a lawful fence, instructed the jury, that whether the fence, and a good one, was in the discretion of the jury; discretion, in its proper sense, implies judgment; and the instruction was correct. *McManus v. Fincan*, 283.

3. Where in such an action, the defendant asked the court as follows: "That if the jury believe from the testimony, that males of other persons beside those of defendant, were in on the premises, at the times set forth in the petition, their defendant's domestic animals did all the damage to the destruction the court refused to give; *Held*, That the instruction fused. *Id.*

TRUST AND TRUSTEE.

2. Where J. M. being desirous, (as the deed recites,) of true religion in the town of Keokuk, and in consideration hand paid, conveyed certain real estate to C. and four other successors, as trustees, in trust, for the use, benefit and support of the Congregational Church at the town of Keokuk, *to be called the Congregational Church of Keokuk*, and said trustees were intent to appropriate the land conveyed, and every part thereof, to the use, lease, or rent thereof, to the use, benefit and support of the first orthodox Congregational Church *which shall be*

town, under the title aforesaid, and until such church shall be organized at the said town, the said trustees shall invest all such moneys, and allow them to accumulate for the benefit of said church, *until the period of such organization*; and where the trustees on the day of the execution of the deed, accepted the trust in writing, and agreed to execute the same; and where the said J. M. after the execution of said deed, in his last will and testament, bequeathed certain real estate to his executors, in trust for his children, and to be conveyed to said children at the expiration of ten years from the date of said will, upon certain conditions, and if either of said children, in the judgment of said executors, failed to comply with such conditions, then the share of such child, was to be conveyed to the said trustees, for the use and support of a Congregational Church at Keokuk; and where the trustees, after the death of the testator, took possession of the real estate so conveyed, and subsequently a Congregational Church, bearing the name indicated in the deed, was organized; 1. *Held*, That the gift to the church, in contemplation of its organization, was valid, and the use good; 2. That the gift was a charity in its largest and most comprehensive sense, as understood either in morals or in law, and a trust in the narrow and more restricted sense, as applied to conveyances between individuals, which courts of equity have always recognized and enforced; 3. That the estate vested in the trustees, until the beneficiaries for whom the charity was intended, were in a condition to call for the application of the fund in the hands of the trustees; 4. That the use was not bad, because the trustees named in the deed, had no power to organize the church, or bring it into existence. *Miller v. Chittenden et al.*, 252.

3. Where in a proceeding in equity to redeem certain real estate sold under a deed of trust, or mortgage, containing a power of sale, it appeared, that I. L. being indebted to C., the said I. L. and one J. L. to secure the said debt, on the 25th day of October, 1842, executed a conveyance of real estate, to P. & C., which deed provided that upon the failure of said grantors to make payment according to the terms of the deed, the said P. & C. were empowered to sell said premises to the highest bidder for cash, "first giving thirty days' public notice of the time, place, and terms of sale, and of the property to be sold, by advertisement in some newspaper printed in Burlington, Iowa Territory," and which deed also contained the following clause: "And the said parties of the second part (P. & C.), covenant faithfully to perform and fulfill the trust herein created. In witness whereof, the said parties have hereunto set their hands and seals, the day and year above written," which deed was signed and acknowledged by the grantors, but not by the said trustees; and where on the 8th day of May, 1847, default having been made in the payment of said debt, the trustees sold the land to the respondent, and in July, 1848, executed and delivered to him a deed for the same—notice of which sale was given by publication in a newspaper, printed in Burlington, which publications were made on the 8th, 15th, 22d, and 29th of April, and on the 6th of May, 1847; and where on the 26th day of September, 1855, the complainants applied to respondent to redeem said real estate, and tendered him his purchase money and interest, which was declined by the said respondent; and where, upon the hearing, the petition of the complainants was dismissed; *Held*, 1. That it was not necessary for the trustees to become a party to the conveyance; 2. That the notice of sale was sufficient, and the sale valid; 3. That the bill was properly dismissed. *Leffler v. Armstrong*, 482.

USURY.

1. Where usury is pleaded as a defence, and the plaintiff is called upon to reply under oath, as to the usury, such sworn replication does not render the defendant incompetent to testify as to the usury. *Bacon v. Lee & Gray*, 490.

2. Where in an action to foreclose a mortgage, executed to secure the payment of two promissory notes, brought by the indorsee of the notes against the makers, the defendants pleaded usury, and called upon the plaintiff to reply under oath, as to the time of the transfer of the notes, and the considera-

tion of such transfer, which he did; and where on the trial the witness was offered as a witness, to prove the usurious contract to which the plaintiff objected, but the objection was overruled, and the witness was permitted to testify; *Held*, That the witness was competent to testify. *Id.*

3. While the act to regulate interest on money, passed in 1862, expressly declares that the usurious contract shall be void, and the same effect is given to its provisions in *no case*, where unlawful interest shall be contracted for in a suit brought upon the contract, have judgment for the money loaned. *Id.*

4. Usury may be pleaded in an action on the note brought in the name of an indorsee, or innocent, *bona fide*

VENDOR AND VENDEE.

1. In an action between the creditors of the vendor and the vendee, a sale of property alleged to have been made with intent to defraud the creditors, the vendor is a competent witness for the creditors to establish the alleged fraud. *Adams v. Fbley et al.*

2. The vendor being a competent witness for the creditors to prove facts tending to show a fraudulent sale of the property, is also a competent witness to prove similar facts. *Id.*

3. Where in an action of trespass by the vendee, against the creditors of the vendor, for seizing and carrying away property, the defendants justified under certain writs of execution, and alleged that the sale to the plaintiff was made in fraud of the creditors of the vendor, which was denied by the plaintiff, where the defendants on the trial offered the widow of the plaintiff to prove circumstances tending to show that the sale was fraudulent, and made with intent to hinder and delay the plaintiff, to which witness the plaintiff objected, that she was incompetent on the ground of interest, which objection was sustained, and she was not allowed to testify; *Held*, That the witness was competent to testify. *Id.*

VENUE.

1. Where a party clearly brings himself within the law of a change of venue, and no special circumstances are shown to the contrary, the court should grant the motion, and a refusal to do so, may, as a matter of course, be reversed by the appellate court. *Welsh v. Savery*, 241.

2. Where the caption and a part of the first count of a complaint are as follows: "The State of Iowa v. John Devine. Before the Justice of the Peace, in and for the county of Benton: charged with the crime of selling intoxicating liquors contrary to law, the defendant, on the 28th day of January, A. D. 1857, by in Vinton, county and state aforesaid;" and where the defendant (who was convicted) averred, "that said defendant was charged with the crime of selling intoxicating liquors contrary to law, on the 28th day of January, A. D. 1857, at the place aforesaid," &c.; *Held*, That the venue was sufficiently laid in the information. *Devine v. The State*, 4.

3. The act allowing a change of venue in suits pending in the peace, approved January 24, 1853, applies to criminal cases. *Miller v. The State*, 505.

4. After allowing a change of venue, the District Court has jurisdiction. *Id.*

applicant to give to the adverse party, a bond to secure him against the additional costs which may be incurred by such change of venue. *Eckles v. Kinney*, 539.

5. Where, after a change of venue is ordered, the adverse party moves to re-docket the cause, and the party taking the change, makes no objection, but appears by his attorneys, and proceeds to the trial of the cause, he cannot assign for error in the appellate court, the decision of the court in re-docketing the cause. *Id.*

6. Where the defendant in an action, filed an affidavit, and motion for a change of venue, on account of the interest and prejudice of the judge, which motion was granted at the May term, 1855, and an order of court made changing the venue to Warren county, in the ninth judicial district; and where at the same term, and after the change of venue had been ordered, the court ordered the defendant to give a bond, in the penalty of \$200, to secure the plaintiff in the additional costs to be incurred by the change of venue; and where at the September term of said court, on motion, the cause was re-docketed, and on the trial, both parties appearing, the jury disagreed, and the cause was continued; and where at the May term, 1856, the defendant filed an affidavit for a change of venue to some other county, for the reason that the inhabitants of Boone county, were so prejudiced against him, that he could not expect a fair and impartial trial, which application was overruled; *Held*, 1. That the court erred in requiring the defendant to execute a bond for the costs; 2. That section 1708 of the Code, which limits a party to one change of venue, did not apply to the case; and 3. That the court erred in overruling the second application for a change of venue. *Id.*

VERDICT.

1. To justify the court in setting aside a verdict, on the ground of the misbehavior of the jury, whether before or after the cause is submitted to them, the alleged misconduct should clearly satisfy the mind of the court, that a fair and impartial trial has not been had, and that the verdict is contrary to the law and the evidence. *Langworthy v. Myers et al.*, 18.

2. If a jury separate after agreement, without the consent of the court, it may amount to misconduct on their part, for which they may be liable; but such separation does not necessarily make the verdict void, or so taint it, as to prevent its reception by the court. *Cook & Owsley v. Walters*, 72.

3. Where the court, soon after the jury retired to consider of their verdict, adjourned for dinner, and before the court convened again, the jury agreed upon their verdict, sealed the same up, and separated, without leave of the court, and without an agreement of the parties, that they might so separate; and where the jury having been called into the box, and being inquired of by the court, if they had agreed upon their verdict, responded that they had, and passed the same to the clerk, sealed up in an envelope, to the reception of which verdict the defendant objected, but the objection was overruled; *Held*, That the verdict was properly received. *Id.*

4. It is not a sufficient reason for setting aside the verdict of a jury, and ordering a new trial, that a portion or all of the jurors, supposed that their verdict, if for the defendant, would not be a bar to a subsequent suit by the plaintiff, for the same cause of action. *Winter, Ex. v. Hile et ux.*, 583.

5. Where, in an action against husband and wife, on a promissory note, made by the wife as executrix, the execution of which note was denied under oath, the jury returned a verdict for the defendants; and where the plaintiff moved the court for a new trial, on the ground of a mistake of the jury as to the law and facts of the case, and a wrong impression as to the rights of the parties, which motion was accompanied by the affidavits of two of the jurors—one of whom states, that in making up the verdict, he was under the

impression, that if the jury found for the defendants, it the plaintiff from bringing another suit, and recovering that he was satisfied that defendants owed plaintiff except under the impression stated, he would not have dict against the plaintiff; and the other states, that he wife had borrowed the money claimed by plaintiff, a note sued on, to be signed and executed for her; that dict for defendants, he supposed that such verdict would future suit and recovery by the plaintiff against defendant part of the jury were of opinion, that the verdict for defendant; and that he is not now satisfied with the verdict, consent to a verdict for defendants; and where the plaintiff court to allow him time to procure the affidavits of the jury cause, in order to show that the jury was mistaken in conclusiveness of their verdict, in case they found for defendant was supported by the affidavit of the plaintiff's states that he had conversed with two of the jurors, at the verdict, and whose affidavits had been procured and believed there was sufficient ground to authorize the grant if time was allowed to procure the affidavits of the rest that the plaintiff would be able to show that the jury law applicable to the case, both of which motions were court; *Held*, That the motions were properly overruled.

1. A demurrer is waived, by the defendant answering :
v. *Silence*, 321; *The State v. McCloskey*, 496.

WARRANT.

WILL.

2. Where the husband dies without issue, and the estate is devised by will, the widow is not entitled to one-half of the estate. *Admr. v. Griffith, Ex.*, 405.

4. Where R. P. on the 25th day of June, 1851, made died about the first of August, 1855; and where the s before his death, and during his last sickness, in the persons, stated that he "wanted his affairs managed as fo was near \$400 on hand, which he wished to be given to I directed the personal property to be sold, and the proce of his wife; and 3. That he directed the farm to be sold, a

\$200 out of the proceeds thereof;" and also, at the same time, spoke of his written will, and supposed it was of no force, as it had never been recorded, and was not to his notion, and said "that one child was as near to him as another;" which verbal disposition was never reduced to writing; *Held*, That there was no revocation of the written will. *Perjue v. Perjue*, 520.

5. Where on an appeal to the District Court, from the decision of the county court, refusing to admit a will to probate, it appeared that the county court found, that said will was duly executed; that the testator was of full age, and sound mind and memory; and that the testator at the time of his death, had changed his mind, and did not desire that said instrument should stand as his will, and thereupon the said county court ordered, that said will be not admitted to probate; and where the District Court, on hearing the cause, made an order that said will be admitted to probate, upon proper and sufficient proof being made to the county court, and that the cause be remanded to the county court, for further proceedings not inconsistent with the decision of the District Court; *Held*, 1. That it was unnecessary to remand the cause to the county court, for further proof of the execution of the will; 2. That the order should have been, that the county court admit the will to probate, and take further proceedings not inconsistent with the finding of the District Court; 3. That the District Court did not err in remanding the cause to the county court. *Ib*.

WITNESS.

1. In an action between the creditors of the vendor and the vendee, to defeat a sale of property alleged to have been made with intent to defraud creditors, the vendor is a competent witness for the creditors, to prove facts tending to establish the alleged fraud. *Adams v. Foley et al.*, 44.

2. The vendor being a competent witness for the creditors, in such a case, to prove facts tending to show a fraudulent sale of the property, his widow is also a competent witness to prove similar facts. *Ib*.

3. Where in an action of trespass by the vendee, against a sheriff and certain creditors of the vendor, for seizing and carrying away certain personal property, the defendants justified under certain writs of attachment and executions, and alleged that the sale to the plaintiff, was made with intent to defraud the creditors of the vendor, which was denied by the replication; and where the defendants on the trial, offered the widow of the vendor as a witness, to prove circumstances tending to show that the sale to the plaintiff was fraudulent, and made with intent to hinder and delay the creditors of her late husband, to which witness the plaintiff objected, that she was incompetent, on the ground of interest, which objection was sustained, and the witness not allowed to testify; *Held*, That the witness was competent, and that the court erred in sustaining the objection. *Ib*.

4. A partner, who, in an action against the partnership, or against the surviving members of a partnership, to recover a debt due by such partnership, permits a judgment to go against him for the debt and costs, becomes a competent witness, to prove that a co-defendant was not a member of such copartnership. *Danforth, Davis & Co. v. Carter & May*, 230.

5. In such a case, the interest of the witness is against the party calling him; and the plaintiff cannot debar the testimony of the witness, by refusing to take the judgment offered. *Ib*.

6. The law does not contemplate that a party is entitled to a continuance, *only* in the event that a witness is absent by whom he can *fully* prove a particular fact; but, if from the witness, he can obtain testimony tending to substantiate particular facts—or, if his testimony will materially assist in determining the issues joined—he has a right to the presence or deposition of the witness, unless there is some other witness by whom the same facts can be

substantiated, to the same extent as they would be by (STOCKTON, J., *dissenting*.) *Welsh v. Savery*, 241.

8. A party applying for a continuance on the ground of witness, need not state in his affidavit, that he cannot find that he cannot fully substantiate or demonstrate by any facts or matters he expects to prove by the absent witness. Other means within his reach, by which he can supply the money, occasioned by the absence of the witness named, as well as the other matters required by the Code, to appear complies with the law, and should have time, ordinary proof. *Id.*

10. The privilege of calling a witness, after the evidence a fact which has been omitted by inadvertence, is within control of the court, as are also the terms to be imposed, just. *Id.*

12. A party has no right to cross-examine any witness, and circumstances connected with the matters stated in his *Cokely v. The State*, 477.

14. Where in an action to foreclose a mortgage, execution of two promissory notes, brought by the indorsee of the makers, the defendants pleaded usury, and called up reply under oath, as to the time of the transfer of the note and of such transfer, which he did; and where on the defendants was offered as a witness, to prove the usurious notes, to which the plaintiff objected, but the objection was defendant permitted to testify; *Held*, That the witness was to testify. *Bacon v. Lee & Gray*, 490.

1. A recognizance in a criminal case, not capital, is *supercedas* on writ of error, unless allowed by a judge of as provided by section 3090 of the Code; and without such the District Court, under section 3230, possesses no power *nizance*. *The State v. McCloskey*, 496.

WRIT OF ERROR CORAM NOBIS.

1. It is only an error in fact, committed by the District Court, in its own judgments, that can be reviewed by a writ of error *coram nobis*. *McKinney v. The Western Stage Co.*, 420.

2. The office of the writ of error *coram nobis*, is to correct a material error in fact, committed *before*, in the presence of *us*, and not before *you*; or an error committed by the court or tribunal *from* which the writ issues, and not by one to which it issues. *Id.*

3. Where parties submitted to arbitrators, a controversy wherein the plaintiff claimed damages for injuries resulting to his wife, by reason of the upsetting of the defendant's coach, and provided in the submission, that the award should be returned to the clerk of the District Court, and judgment entered thereon by the clerk, in vacation; and where the arbitrators made an award in favor of the plaintiff, upon which judgment was rendered by the clerk of the District Court, under the terms of the submission; and where the defendants then filed their petition for a writ of error *coram nobis*, to inquire into the regularity of the proceedings before the arbitrators, as well as the regularity of the entry of the said judgment by the clerk; and where at the next term of the said District Court, said writ, on motion of the plaintiff, was dismissed, and the judgment entered by the clerk vacated; and where the award was adopted by the court, and judgment entered thereon in favor of the plaintiff; *Held*, 1. That the writ was properly dismissed; 2. That any loss to the husband, in consequence of being deprived of the society of the wife, or being put to expense on account of the injury received by her, could be legitimately considered by the arbitrators under the terms of the submission. *Id.*

Ex. J. M.

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